Nos. 34334 & 34335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al., Plaintiffs Below, Appellees,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants Below,

E.I. DU PONT DE NEMOURS AND COMPANY, Appellant.

Honorable Judge Thomas A. Bedell
Circuit Court of Harrison County
Civil Action No. 04-C-296-2

APPELLANT'S BRIEF

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INTRODUCTION

Appellant E.I. du Pont de Nemours and Company ("DuPont") operated a zinc smelter in Spelter, West Virginia from 1928 to 1950. Before DuPont acquired the smelter, neighbors had sued the prior owner, complaining about emissions from the facility. But when DuPont took over, it upgraded the plant's operations, reduced its environmental impact, and settled the lawsuits. Throughout its 22-year tenure, DuPont operated the smelter lawfully and in accordance with industry standards. Neighbors' complaints ceased during DuPont's operation of the plant.

DuPont sold the plant in 1950 and never operated it again. Over the next five decades, zinc producers unrelated to DuPont owned and operated the smelter. In the late 1990s, when T.L. Diamond was the owner-operator, the U.S. Environmental Protection Agency ("EPA") raised environmental concerns about the plant. Even though DuPont had not owned or operated the smelter for nearly half a century, it accepted responsibility for cleaning up the site.

With the approval of EPA and the West Virginia Department of Environmental Protection ("DEP"), DuPont voluntarily and successfully remediated the site. DuPont spent $20 million on the cleanup, transforming the site from a blighted eyesore into an open, green space. Neither EPA nor DEP ever found DuPont in violation of any regulations or requirements. Plaintiffs' expert said that DuPont's remediation "is a very good example of taking a highly-contaminated site, remediating it and putting it back into useful service."

When they evaluated the site, EPA and DEP considered potential off-site risks. In 1996, at EPA's request, the Agency for Toxic Substances and Disease Registry ("ATSDR") tested blood-lead levels of Spelter children. EPA and DEP also measured contaminants in yards of homes near the smelter. After evaluating the off-site testing, neither EPA nor DEP recommended or required further off-site testing or remediation in the community. In 2001, DEP

concluded: "[T]here is no unacceptable risk to off-site residents due to off-site soil contaminants and . . . there is no further need for off-site sampling."

In 2004, near the completion of DuPont's remediation, Plaintiffs filed a class-action lawsuit. They alleged that since 1910 class members and their properties had been exposed to toxic levels of arsenic, cadmium, and lead from plant emissions. They made no claim of personal injury. Instead, they sought property damages, medical monitoring, and punitive damages.

At trial, class-area measurements showed that contaminants in the vast majority of samples were below West Virginia's regulatory "screening levels"—levels that are protective to health and considered "clean." For example, Plaintiffs' own class-area soil tests showed that 98 percent were below the West Virginia cadmium screening level, 95 percent were below the lead screening level, and 96 percent were below Plaintiffs' expert's original arsenic screening level. Plaintiffs presented no direct evidence that class members had harmful contaminant levels in their bodies. To the contrary, ATSDR's 1996 blood-lead tests of Spelter children showed no hazardous lead exposure. In addition, a 2005 blood-lead test of class representative Lenora Perrine, who has lived near the plant for decades, was normal, though the trial court excluded that evidence.

Despite the absence of evidence showing property damage or health risks, the jury returned verdicts for the two classes. It awarded $55 million in remediation damages, medical monitoring (which the court valued at $130 million), and $196.2 million in punitive damages. The court awarded Plaintiffs' lawyers $135 million in fees and expenses from the common fund and each of the ten class representatives $50,000 "incentive payments" from the fee award.

This outcome was the product of numerous prejudicial errors by the trial court.

* * *

The Circuit Court made a series of rulings that enabled Plaintiffs to infect all phases of the trial with prohibited evidence and argument. The court repeatedly admitted inflammatory allegations about DuPont conduct at plants other than Spelter, in disregard of Rule 404(b) and the mandatory procedures of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). The court allowed Plaintiffs to present a soil scientist to provide the medical causation conclusions, health-risk assessments, and toxicology opinions that formed the foundation of Plaintiffs' case. And the court permitted Plaintiffs to urge the jury to punish DuPont for constitutionally protected efforts to lobby state and federal regulators to take favorable regulatory action.

In addition to allowing Plaintiffs to paper over the gaping holes in their case, the court made erroneous rulings that hamstrung DuPont's defense. To begin with, the court granted summary judgment *sua sponte* against DuPont on the statute of limitations as to all class members. The court thereby removed this fact-intensive issue from the jury even though (1) there was abundant evidence from which the jury could have found that some or all of the class members had or should have had knowledge of their claims more than two years before suit was filed, and (2) it is well established in West Virginia law that the accrual of the statute of limitations is an issue for the jury in all but the clearest of cases. The court further undermined DuPont's defense by granting summary judgment against DuPont on co-defendant T.L. Diamond's indemnification claim, in disregard of plain contract language and West Virginia law that a contract will not be construed to indemnify a party from its own negligence absent the most "clear and definite" indication of an intent to do so. The court required DuPont to defend, rather than to disavow, Diamond's operations—which, in contrast to DuPont's, were

characterized by chronic emissions complaints and citations. As a consequence, DuPont was precluded from showing that the more recent, longer-term owner was at fault.

The court also thwarted DuPont's defense by barring DuPont from introducing individualized evidence concerning the class representatives' claims, including the normal blood-lead test of Mrs. Perrine. The court reasoned that evidence specific to the class representatives is irrelevant in a class action. In so ruling, the court turned the class-action concept on its head and violated DuPont's state and federal due process rights to present a defense.

The Circuit Court's errors resulted in verdicts for property-remediation damages, medical-monitoring liability, and punitive damages even though the environmental and medical evidence shows that the class area is not at increased risk.

First, the court refused to instruct the jury on the meaning of "exposure," and to tell the jury that it could award remediation damages only for material injury caused by DuPont. In doing so, the court permitted the jury to find liability and to impose remediation damages if *any* amount of arsenic, cadmium, or lead migrated from the smelter to the class area.

The court also permitted the jury to find liability for medical monitoring without evidence of significant class-wide contaminant exposure or increased health risk. Plaintiffs' own environmental measurements and the ATSDR blood-lead tests contradicted their claims of significant exposure and risk. The flawed, inadmissible health-risk assessment of Dr. Brown, the soil scientist, failed to establish any health risk justifying classwide medical monitoring. Uncontradicted evidence showed that the "increased risk" sufficient for admission into the medical-monitoring program is *de minimis*—an increased risk equivalent to that of smoking a single pack of cigarettes over an entire lifetime. Even accepting Brown's risk assessment,

undisputed evidence showed that CT scans, a $50 million component of the monitoring program, present far more risk to the class than did the smelter.

The court upheld the punitive-damages verdict despite the evidence that (1) DuPont operated the plant from 1928 to 1950 in accordance with industry standards, and (2) DuPont remediated the site under the supervision of and with the approval of EPA and DEP. This evidence precluded punitive damages. Even if there had been a basis for punitive liability, the $196.2 million award is far larger than any amount reasonably necessary to punish and deter.

KIND OF PROCEEDING AND NATURE OF THE RULINGS

Plaintiffs filed their class-action complaint against DuPont and three former owners of the smelter on June 15, 2004. They alleged negligence, negligence per se, public and private nuisance, trespass, strict liability, and unjust enrichment based on alleged exposure to arsenic, cadmium, and lead emitted from the smelter. Plaintiffs did not allege that the smelter had caused any personal injury to any putative class member. They instead sought medical monitoring, property damages, and punitive damages.

The Circuit Court certified two classes: a medical-monitoring class of persons who resided in a five-by-seven-mile area surrounding the plant for certain minimum time periods within the last 40 years, and a class of property owners within the class area.

Before trial, the Circuit Court granted Plaintiffs' motion for summary judgment on DuPont's duty to indemnify Diamond for any liability to Plaintiffs and for defense costs. DuPont alone defended the case at trial.

The Circuit Court conducted the trial in four phases: general liability (Phase I); medical monitoring (Phase II); property damages (Phase III); and punitive damages (Phase IV). The jury found DuPont liable in Phase I for negligence, nuisance, trespass, and strict liability. In Phases

II, III, and IV, the jury awarded medical monitoring to the medical-monitoring class, $55 million in remediation damages to the property class, and $196.2 million in punitive damages.

The Circuit Court entered an Amended Final Judgment Order on November 16, 2007. DuPont filed post-judgment motions under Rules 50(b) and 59 on December 4, 2007. On February 15, 2008, the Circuit Court entered a Final Judgment Order on Diamond's indemnification claim. The Circuit Court denied DuPont's post-judgment motions on February 25, 2008, in lengthy orders taken nearly verbatim from drafts that Plaintiffs' counsel submitted. On the same day, the Circuit Court adopted Plaintiffs' medical-monitoring plan in its entirety.

STATEMENT OF FACTS

Smelter ownership and operation: 1911-2001. Grasselli Chemical Company built the Spelter zinc smelter in 1911 and operated it until 1928. Grasselli's operation involved 8,400 horizontal retort furnaces, each of which generated industrial byproduct and waste. Grasselli began the practice of storing production waste, known as "tailings," onsite in a pile that ultimately covered much of the plant site. (Binder 40, 9/13/07 Tr. 1055-58; PX 987.) [1]

During Grasselli's tenure, the local community repeatedly complained about the smelter's emissions. From 1919 through the 1920s, nearby residents filed dozens of lawsuits against Grasselli for alleged property damage due to plant emissions. (Binder 41, 9/20/07 Tr. 2786; *Lyon v. Grasselli Chem. Co.*, 106 W. Va. 518, 520, 146 S.E. 57, 58 (1928).)[2]

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[1] DuPont cites the Circuit Court Clerk's trial record index, where available. Index cites are in the following format: "Binder __, p. __." The page cites refer to the first page of the cited document.

[2] Grasselli hired two scientists, Bear and Morgan, to investigate the effects of plant emissions on local crops and livestock. In 1919, Bear and Morgan memorialized their findings in a report titled *Meadowbrook Investigations 1919*. (PX 15083.) The 1919 report was written about a decade before DuPont acquired the plant and modernized its operations. DuPont produced the 1919 report as part of its first document production in this case.

DuPont purchased Grasselli in 1928. (Binder 42, 9/24/07 Tr. 2923.) Aware of the community's complaints about smelter emissions, DuPont changed the plant's operations. DuPont implemented state-of-the-art industrial processes, replacing the smelter's 8,400 horizontal retorts with 20 vertical retorts by 1930. (*Id.*) Plaintiffs' expert admitted that DuPont's improvements made the facility a "cleaner operation." (Binder 40, 9/13/07 Tr. 1165.) DuPont also settled the residents' lawsuits against Grasselli. (Binder 42, 9/24/07 Tr. 2924.)

After DuPont's transformation of the smelter operations, community complaints ceased. DuPont owned and operated the plant until 1950. During its 22-year tenure, DuPont operated the smelter in accordance with industry standards. (*Id.* 2923-26.) There were no lawsuits about plant emissions after DuPont updated the technology in 1930, until after the plant closed in 2001. (*Id.* 2924-26.)

In 1950, DuPont sold the Spelter plant to Matthiessen & Hegeler, then one of the world's largest zinc manufacturers. M&H owned and operated the plant until 1971, when it sold the plant to Diamond. (Binder 40, 9/12/07 Tr. 820-21; Binder 42, 9/24/07 Tr. 3088.)

Diamond owned and operated the plant from 1971-2001. (Binder 40, 9/14/07 Tr. 1460; Binder 42, 9/24/07 Tr. 3088.) During the three decades that Diamond operated the plant, regulatory authorities cited it numerous times for violating emissions regulations. (*See, e.g.*, PX 362, 364, 373-74, 379.)

DuPont's remediation of the plant site. In 1996, while Diamond owned the facility, EPA issued a Notice of Potential Liability. (DX 635.) The tailings pile had grown to become a blighted eyesore in the center of Spelter. The EPA Notice stated that Diamond and prior owners faced potential liability for remediation under federal environmental statutes. Because Diamond had limited financial resources and other prior owners could not be found, DuPont accepted

primary remediation responsibility. DuPont did so even though nearly 50 years had passed since it owned or operated the site.

Around the time of its Notice concerning the plant site, EPA evaluated potential off-site contamination. In 1996, at EPA's request, ATSDR measured blood-lead levels of children in the Spelter area. (DX 648.) Based on the blood-lead testing results, ATSDR found that "it does not appear that children in Spelter are being exposed to hazardous levels of lead." (*Id.* at 3.) ATSDR concluded that "further community-wide screening for lead poisoning in Spelter is not indicated at this time." (*Id.*)

In 1996, EPA and DEP measured contaminant levels in the yards of eleven homes located near the plant. (Binder 41, 9/18/07 Tr. 2205-07.) Based on those off-site measurements, EPA saw no need for further off-site sampling. (*Id.*)

In 1997, EPA issued an Administrative Order requiring extensive site stabilization and remediation. (DX 690; Binder 41, 9/18/07 Tr. 2206-07.) EPA's order did not require or recommend any off-site testing or remediation in the surrounding community.

Over the next two years, DuPont worked closely with EPA, which had oversight and approval authority, to stabilize and to begin cleaning up the 112-acre site. (Binder 41, 9/18/07 Tr. 2230-34.) DuPont took responsibility for and paid for these projects (DX 694) even though Diamond continued to own and operate the smelter.

In 1999, EPA confirmed that DuPont had satisfied the Administrative Order. (DX 5037.) EPA never found DuPont in violation of any regulations or orders. (Binder 41, 9/18/07 Tr. 2241-42.) EPA never fined or otherwise penalized DuPont.

After it had satisfied EPA's Administrative Order, DuPont applied to place the Spelter site in West Virginia's Voluntary Remediation and Redevelopment Program ("VRRP").

(DX 760.) The VRRP is West Virginia's alternative to EPA's Superfund program. (Binder 50, 10/17/07 Tr. 5457-60.) By the VRRP, West Virginia encourages property owners to remediate, redevelop, and make productive use of contaminated properties. The VRRP requires extensive planning, well-documented scientific and environmental analyses, and DEP-approved cleanup methods. (*Id.* 5455-56, 5458-59.)

DuPont's VRRP application required the consent of both EPA and DEP. (*See* W. Va. Code § 22-22-4; Binder 50, 10/17/07 Tr. 5464-69, 5517-18.) The VRRP is available only when "the release which is subject to remediation was not created through gross negligence or willful misconduct." W. Va. Code § 22-22-4(a). Both EPA and DEP consented to DuPont proceeding under the state-administered program. In January 2000, DuPont and Diamond entered into a voluntary remediation agreement with DEP for the clean-up of the site. (DX 779; W. Va. Code § 22-22-7(e).) The DEP remediation agreement did not call for any off-site remediation.

In July 2001, DEP confirmed that off-site remediation was not necessary. In a letter to the Harrison County Planning Commission, DEP Director Ken Ellison stated: "[T]here is no unacceptable risk to off-site residents due to off-site soil contaminants and . . . there is no further need for off-site soil sampling." (DX 837; Binder 50, 10/17/07 Tr. 5471-72.)

In 2001, Diamond shut down plant operations. To facilitate completion of the remediation, DuPont bought the property from Diamond and took sole responsibility for the cleanup. (DX 779.) Over the next four years, DuPont completed the cleanup under DEP's direction.

DEP staff was actively engaged in DuPont's cleanup. DEP supervised and approved each step of DuPont's remediation efforts, including the development of detailed work plans, building decontamination and demolition, soil remediation, design and installation of an

engineered cap, and ongoing monitoring. (Binder 50, 10/17/07 Tr. 5467-68.) DEP never found DuPont in violation of any regulation or order. (Binder 41, 9/18/07 Tr. 2241-42; Binder 41, 9/19/07 Tr. 2353-54.)

DuPont spent approximately $20 million to remediate the site in conformance with EPA's and DEP's requirements. (Binder 41, 9/17/07 Tr. 1958.) DuPont substantially completed the remediation by 2005. DuPont's efforts transformed the site from an industrial eyesore to a green, open space, ready for redevelopment. As Plaintiffs' expert Dr. Flowers admitted, "This smelter site is a very good example of taking a highly-contaminated site, remediating it and putting it back into useful service." (Binder 40, 9/13/07 Tr. 1085-86.)

Evidence of contaminants in the class area. It is undisputed that arsenic, cadmium, and lead are ubiquitous and present naturally in the environment. (Binder 41, 9/20/07 Tr. 2611-12.) That those elements are present in the class area, or that some low-level contamination came from the smelter, says nothing about health risks or the need for property remediation. (*Id.*) Whether there are increased health risks and a necessity for remediation instead depends on whether the elements are present at levels above safe "screening levels." (*Id.* 2612-14; Binder 42, 9/25/07 Tr. 3192-3200.)

Screening levels are health-based regulatory levels with built-in safety margins. (Binder 42, 9/25/07 Tr. 3192-3200.) They are designed to protect even the most sensitive people in a population over a lifetime of exposure. (*Id.*) Dr. Brown, Plaintiffs' expert soil scientist, acknowledged that property is considered "clean" when contaminant levels are below screening levels. (Binder 41, 9/20/07 Tr. 2612-14.) Exposure to chemicals at levels below screening levels—which virtually everyone experiences—poses no health risk. (Binder 42, 9/25/07 Tr. 3200.)

Soil tests throughout the class area showed that in nearly all samples cadmium, lead, and arsenic were present at levels below screening levels. Plaintiffs' experts' own measurements showed: 98 percent of the class-area soil samples were below the West Virginia cadmium screening level (37 parts per million ("ppm")); 95 percent were below the lead screening level (400 ppm); and 96 percent were below Dr. Brown's original arsenic screening level (23 ppm). (Binder 40, 9/13/07 Tr. 1193-97.)[3]

Similarly, Plaintiffs' experts' measurements of contaminants in dust collected from the living areas of homes showed that 100 percent of cadmium samples, 72 percent of lead samples, and 100 percent of arsenic samples were below dust guidance levels. (Binder 41, 9/20/07 Tr. 2631-32.) Plaintiffs' experts found higher levels of contaminants in attic dust samples, but Dr. Brown conceded that attic dust posed no elevated health risk in the class area because any exposure would be limited and rare. (*Id.* 2692.)

Air measurements also failed to show a class-wide hazard. Most of Dr. Brown's air testing found no detectible contamination. (*Id.* 2664.) After first reporting these non-detects as zeros, Brown changed his methodology and reported them at assumed values that were hundreds or even thousands of times higher than air screening levels. (*Id.* 2668-69, 2675-79.) His measurements showed only 1 sample (out of 187) with arsenic at a level above the reporting limit of his equipment. (*Id.* 2664.)

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[3] Pursuant to DEP guidelines the arsenic screening level is derived by calculating the naturally occurring background level. (Binder 41, 9/20/07 Tr. 2616.) At a May 2006 class-certification hearing, Dr. Brown testified that 23 ppm is the appropriate clean-up level for arsenic in the class area. (Binder 40, 9/13/07 Tr. 1184-85.) In April 2007, after it became apparent that nearly all of Plaintiffs' samples were below that level, Brown "adjusted" the clean-up threshold downward to 12.5 ppm. Brown admitted that he has never before recommended an arsenic clean-up threshold lower than 20 ppm. (Binder 41, 9/20/07 Tr. 2620-22.)

Absence of evidence of contaminants in class members' bodies. Dr. Brown testified that, despite DuPont's remediation of the plant site, hazardous exposure to contaminants is ongoing in the class area. (*See, e.g.*, *id.* 2609-10; *see also* Binder 41, 9/19/07 Tr. 2518, 2563.) If Brown were right, contaminants would be present at hazardous levels in the bodies of class members. Yet Plaintiffs' experts chose not to measure contaminant levels in the bodies of any class members. Plaintiffs presented no blood tests or other direct evidence that contaminants entered any class member's body, much less at a level that could cause harm.

Such evidence as there was contradicted Plaintiffs' claims of significant exposure. ATSDR had tested blood-lead levels of children in the Spelter area in 1996 and concluded that the tests did not show hazardous lead exposure or a need for further community blood-lead screening. (DX 648.)

In addition, DuPont learned in discovery that class representative Lenora Perrine had a blood-lead test administered by her doctor in 2005. That test showed that Mrs. Perrine, who has lived next to the plant for decades, had a normal blood-lead level. (Binder 41, p. 18572, 7/11/07 Harman Dep. Tr. 26-36, attached to Pls.' Mot. to Exclude (Sept. 24, 2007).) DuPont's expert would have testified that Mrs. Perrine's blood-lead test showed her blood-lead level to be "very, very much below [any] level of concern." (Binder 42, 9/25/07 Tr. 3290; *see also id.* 3294.)

ASSIGNMENTS OF ERROR

The Circuit Court committed reversible error by:

I. Allowing Plaintiffs to introduce highly prejudicial "other acts" evidence regarding alleged misconduct at different DuPont facilities;

II. Allowing Dr. Brown, a soil scientist with no medical training, to give medical, health-risk, and toxicology opinions, outside his area of expertise;

III. Allowing the jury to base liability on DuPont's constitutionally protected communications with government officials;

IV. Barring DuPont from presenting its statute-of-limitations defense to the jury;

V. Requiring DuPont to stand responsible for Diamond's conduct and to indemnify Diamond for liability resulting from its conduct;

VI. Trying this case as a class action despite the predominance of individual issues, and preventing DuPont from introducing individualized evidence (such as Mrs. Perrine's blood-lead test) and presenting individualized defenses to the claims of class representatives (such as the statute of limitations);

VII. Allowing the property class to recover property remediation damages without proof that DuPont's conduct caused actual, non-trivial harm to each class member's property;

VIII. Imposing medical-monitoring liability despite the lack of evidence that class members suffered dangerous exposure to chemicals as a result of smelter operations, and adopting a medical-monitoring program that will cause more harm than it prevents, and;

IX. Refusing to grant judgment notwithstanding the verdict on punitive damages even though DuPont (1) complied with industry standards when it operated the facility, and (2) remediated the site under the supervision of, and to the satisfaction of, the expert regulators; refusing to instruct the jury that the law prohibits imposing punishment based on evidence of dissimilar conduct; permitting Plaintiffs' counsel to urge the jury to "send a message" to DuPont as a large, out-of-state corporation; declining to reduce the punitive award to the least amount necessary to satisfy West Virginia's interests in retribution and deterrence; and permitting the jury to award punitive damages to medical-monitoring class members who proved no present personal injury.

ARGUMENT

I. The Circuit Court Permitted Plaintiffs to Infect the Trial with Prohibited Evidence and Argument

Plaintiffs' claims of class-wide health risks and property damage were contradicted by (1) the evidence that environmental contaminant levels were below screening levels in the vast majority of sampling done by Plaintiffs' own experts, and (2) the absence of evidence of hazardous levels of contaminants in any class member's body. But the Circuit Court made a series of erroneous and highly prejudicial rulings that enabled Plaintiffs to overcome these profound weaknesses in their case.

First, the Court permitted Plaintiffs to present inadmissible and inflammatory "other acts" evidence and rhetoric relating to alleged DuPont misconduct at plants other than Spelter. Second, the court allowed Plaintiffs to use a soil scientist to provide medical and toxicology opinions that were central to Plaintiffs' case. Third, the court permitted Plaintiffs to urge the jury to punish DuPont for its constitutionally protected efforts to petition the state and federal governments regarding regulatory action related to the Spelter site.

A. The Court Allowed Plaintiffs to Present Highly Prejudicial "Other Acts" Evidence and Argument in Disregard of Rule 404(b) and Without Following Required Procedures

This Court has recognized "the potential for unfair prejudice that is inherent in 'prior bad acts' evidence." *State v. McDaniel*, 211 W. Va. 9, 12, 560 S.E.2d 484, 487 (2001). West Virginia law addresses this problem in two ways. First, Rule of Evidence 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith." Second, even if there is a proper purpose for other-acts evidence, a trial court must apply a

stringent set of procedural safeguards before admitting such evidence. Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). Failure to abide by these procedures is a *per se* abuse of discretion. *Stafford v. Rocky Hollow Coal Co.*, 198 W. Va. 593, 600, 482 S.E.2d 210, 217 (1996).

These mandatory procedures include an "*in camera* hearing" where the court must (1) hear "the evidence and arguments of counsel" and (2) make a finding "by a preponderance of the evidence" as to whether "the acts or conduct occurred" and whether "the defendant committed the acts." Syl. Pt. 2, *McGinnis*, 193 W. Va. at 150, 455 S.E.2d at 520. If the party seeking to introduce the other-acts evidence makes the required showing, then the court must "determine the relevancy of the evidence under Rules 401 and 402 . . . and conduct the balancing required under Rule 403." *Id.* "If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted." *Id.*

In repeatedly allowing Plaintiffs to introduce evidence and make arguments about alleged "other bad acts" by DuPont, the Circuit Court disregarded these indispensable safeguards. The court's open-door approach to the other-acts evidence constitutes a *per se* abuse of discretion and requires a new trial—one not tainted with impermissible character attacks.

The Forte videotape deposition. Starting early in the trial, Plaintiffs injected allegations about other sites, other chemicals, and other acts unrelated to Spelter. As their second witness, Plaintiffs called Kathleen Forte, who testified by videotaped deposition. Forte is a DuPont executive who had no responsibility for Spelter and knew virtually nothing about the site. The deposition consisted mainly of Plaintiffs' counsel's badgering

rhetorical questions and his characterizations of documents Forte had never seen. (*E.g.*, Binder 40, 9/13/07 Tr. 1231, 1236-40, 1266.)

Plaintiffs used the Forte deposition to infect the trial with allegations that DuPont polluted other sites around the country. Plaintiffs' counsel showed Forte a map of current and former DuPont facilities and claimed that it showed "contamination sites." (*Id.* 1302, 1309; PX 72902.) Plaintiffs' counsel asked Forte about each of the ten locations on the map other than Spelter. (Binder 40, 9/13/07 Tr. 1305-12.) When Forte explained that she knew little about most of the locations, Plaintiffs' counsel offered his own characterizations to the jury. For example, he described Barksdale, Wisconsin as a site where DuPont caused "property devaluation," and Pompton Lakes, New Jersey as a site with "mercury contamination." (*Id.* 1309.)

In response to a question by Plaintiffs' counsel about medical monitoring, Forte said that she believed there were monitoring programs at two of the other locations. (*Id.* 1313.) Plaintiffs' counsel then asked rhetorically why DuPont shouldn't establish medical-monitoring programs at all other locations, including Spelter: "[Y]ou've got 11 site facilities up there, and you only have medical monitoring in two of them. What about the other ones? Aren't people entitled to be medically monitored in those sites too?" (*Id.* 1313-14.)

In admitting this questioning about alleged contamination at other plants, the Circuit Court ignored its obligations under *McGinnis*. First, the Court failed to conduct an *in camera* hearing to review the Forte testimony and to determine whether Plaintiffs' allegations about the other sites were true. The court never determined (a) whether the other sites were "contaminated," (b) whether DuPont caused the contamination, or

(c) whether medical monitoring was appropriate. As this Court has observed, *McGinnis* hearings are indispensable: "If no inquiry was conducted by the trial court, how could the trial court have made a finding by a preponderance of the evidence that the acts did in fact occur?" *Stafford*, 198 W. Va. at 599, 482 S.E.2d at 216.

Second, the Circuit Court disregarded *McGinnis*'s requirement that "[t]he specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syl. Pt. 1, 193 W. Va. at 147, 455 S.E.2d at 516; *see also* Syl. Pt. 8, *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). Plaintiffs never identified any proper purpose for their accusations of contamination at other sites, including Forte's testimony.

Third, the court failed to determine the relevance of the other-acts evidence under Rules 401 and 402 and to conduct the required Rule 403 balancing. The court never required Plaintiffs to demonstrate any similarity between DuPont's Spelter operations and its alleged conduct at the other sites, a prerequisite to the admissibility of other-acts evidence. Syl. Pt. 3, *Gable v. Kroger Co.*, 186 W. Va. 62, 410 S.E.2d 701 (1991). Nor could Plaintiffs have made a showing of similarity: the other sites are scattered throughout the country, produced different products by different processes, and were operated at different times over the past century.

Fourth, the court never gave the required limiting instruction despite DuPont's repeated requests for such an instruction.[4]

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[4] *See* Binder 40, 9/13/07 Tr. 1348-51; Binder 20, p. 18339, DuPont's Supp. Req. for a Limiting Instr. on 404(b) Evid. (9/14/07); Binder 20, p. 18391, Pls.' Resp. to DuPont's Limiting Instr. on 404(b)

Plaintiffs cannot dispute that the Court failed to abide by *McGinnis* Instead, they have tried to justify the improper Forte testimony on other grounds. First, they claim that DuPont waived its 404(b) objections. Second, they claim that the other-sites evidence was used only to "impeach" Forte. They are wrong on both points.

DuPont did more than enough to preserve its 404(b) objection. Before trial, DuPont moved *in limine* to exclude evidence of other alleged wrongdoing at its plant in Parkersburg, West Virginia, and at other sites around the country, on the ground that admission of this evidence would violate Rule 404(b). (Binder 29, p. 12329, DuPont's Mot. in Limine re Other Lawsuits, Chemicals, Plants etc. at 2, 5 (7/25/07).)[5] The court denied the motion without prejudice.

At trial, before Forte testified, DuPont moved to exclude her testimony, arguing that the other-sites evidence was inadmissible under Rule 404(b). (Binder 40, p. 18040, DuPont's Supp. Objs., Counter-Desigs. re Forte (9/12/07).) Expressly invoking Rule 404(b), DuPont contended: "[The] extended line of questioning about sites other than Spelter is a transparent attempt to create the impermissible inference that DuPont's acts at sites other than Spelter show how it acted at Spelter." (*Id.* 4.) DuPont also cited, by page and line number, specific questions that were "improper character evidence under 404(b)." (*Id.* 8.)

In oral argument, before Plaintiffs played Forte's testimony, DuPont reiterated its objection to "testimony or questioning with regard to other sites which are not the subject of this litigation, including Parkersburg and Pompton Lakes." (Binder 40, 9/13/07 Tr.

Evid. (9/17/07); Binder 20, p. 18400, DuPont's Objs. to Pls.' Limiting Instr. on 404(b) Evid. (9/17/07); Binder 42, p. 19349, DuPont's Obj. to Instr., Nos. 3A & 3B (9/28/07).

[5] The motion is dated July 25, 2007, but appears on the Circuit Court's index on July 26, 2007.

1204-05.) The court overruled DuPont's objections to the other-sites evidence. (*Id.* 1203-12.)

After the Forte testimony, DuPont objected to admitting the document that included the map of other plant sites, arguing again that such evidence was "in violation of 404(b)," "highly irrelevant," and "prejudicial." (*Id.* 1348-49.) DuPont also pointed out that Plaintiffs did not provide the Court with the required "advance notice of this 404(b) evidence" (*id.* at 1349), which would have assisted the Court in complying with the *McGinnis* procedures. The Court again overruled DuPont's objections. (*Id.* 1351-52.)

Plaintiffs' second argument, that the "other sites" evidence was proper impeachment of Forte, is also wrong. During trial, Plaintiffs never made this argument. The self-evident purpose of the Forte testimony was to introduce the "other sites" evidence, not to "impeach" Forte's testimony. In any event, Forte said nothing that could be impeached by badgering questions about whether she knew about alleged contamination at other sites (*id.* 1236-40) or whether she thought that neighbors of those sites were entitled to medical monitoring (*id.* 1314). This Court repeatedly has warned against expanding the impeachment rationale to skirt the limitations on improper evidence. *See, e.g.*, *Arnoldt v. Ashland Oil, Inc.*, 186 W. Va. 394, 407-08, 412 S.E.2d 795, 808-09 (1991) ("Notwithstanding its seemingly broad language, Rule 607 does not free either party to introduce otherwise inadmissible evidence into trial under the guise of impeachment.") (internal quotation marks omitted); *Young v. Saldanha*, 189 W. Va. 330, 337, 431 S.E.2d 669, 676 (1993).

The false charge that Dr. Rodricks "phonied up" a Parkersburg report. The court compounded these errors during Plaintiffs' questioning of DuPont's expert toxicologist Dr.

Joseph Rodricks. Dr. Rodricks is a distinguished scientist who has advised EPA and the World Health Organization, and served on 25 committees of the National Academy of Sciences. (Binder 42, 9/25/07 Tr. 3184-85.) The court permitted Plaintiffs' lawyer to falsely accuse Dr. Rodricks of conspiring with DuPont to falsify a report to EPA concerning C8, a compound used at DuPont's plant in Parkersburg:

> Sir, isn't it true, you actually created a report for DuPont that phonied up—I mean, absolutely phonied up—information to the EPA about the dangers of cancer for those kids in Parkersburg. Is that the first you've ever heard of that?

(*Id.* 3353; *see also id.* 3372.)

Again, DuPont objected to the other-acts allegation. Again, the court ignored the required *McGinnis* procedures: It failed to conduct an *in camera* hearing, failed to make any finding that the inflammatory allegation was true, failed to conduct the Rule 403 balancing, and failed to give any limiting instruction. Instead, the court ruled that the witness could respond to the charges himself. (*Id.* 3356.)

Plaintiffs proceeded with a long line of questioning about C8 and Parkersburg. (*Id.* 3364-78.) Plaintiffs' counsel asked Dr. Rodricks whether there was a medical-monitoring program at Parkersburg (*id.* 3366-67) and claimed that "the people in Parkersburg were concerned about . . . getting liver cancer" (*id.* 3368-69). Plaintiffs' counsel asked Dr. Rodricks whether it was "good science for you to mess with" "information that has to do with liver cancer in children from a product that a manufacturer like DuPont makes." (*Id.* 3371-72.) Plaintiffs ended their cross-examination about Parkersburg with questions about DuPont's C8 litigation strategy based on an email that Rodricks had never seen. (*Id.* 3376-78.)

Plaintiffs assert that DuPont waived its objections to these allegations. To the contrary, DuPont immediately objected to the Parkersburg charge during Rodricks's cross-examination, but the court overruled DuPont's objection. (*Id.* 3353-63.) The next day, as the Rodricks cross-examination continued, DuPont moved for a mistrial based on the improper Parkersburg 404(b) evidence. (Binder 42, 9/26/07 Tr. 3498-3503.) The court denied DuPont's motion, but "preserve[d] the objections of DuPont for all purposes." (*Id.* 3503.)

Plaintiffs also are wrong that their allegations against Dr. Rodricks were proper impeachment under Rule 608(b). First, Plaintiffs cannot explain how their line of questioning about C8 and Parkersburg impeached Dr. Rodricks. Nor can they support their charge that he misled the EPA. Here again, Plaintiffs' argument is the type of end-run around the requirements of 404(b) that this Court warned against in *Arnoldt.* 186 W. Va. at 407-08, 412 S.E.2d at 808-09.

Second, even if Plaintiffs' EPA allegation were impeachment evidence as to Dr. Rodricks, it was improper character evidence *as to DuPont.* Plaintiffs' counsel accused both Dr. Rodricks and DuPont of conspiring to mislead EPA. (Binder 42, 9/25/07 Tr. 3352-78.) If the Court had conducted the evidentiary hearing required by Rule 404(b), DuPont would have had an opportunity to show that Plaintiffs' allegation was false.

Third, Plaintiffs tried to prove their accusation against DuPont and Dr. Rodricks by using a series of DuPont documents. (*Id.* 3364-78.) Under Rule 608(b), however, specific instances of conduct "may not be proved by extrinsic evidence."

The court's admission of the false, inflammatory charge that Dr. Rodricks and DuPont "phonied up" a childhood cancer report to EPA and related questioning was reversible error.

The Phase II "other sites" closing argument. Plaintiffs' closing argument during the medical-monitoring phase of trial is another example of their improper use of other-

sites evidence. Plaintiffs' counsel started his closing argument by focusing on a DuPont document that describes the company's 2002 expenditures related to external advocacy groups. (Binder 46, 10/9/07 Tr. 4660-66; PX 71759.) Plaintiffs' counsel focused on contributions to the Harvard Center for Risk Analysis, which he claimed showed DuPont's commitment to a "risk-based concept." (Binder 46, 10/9/07 Tr. 4664.) According to Plaintiffs' counsel, DuPont's "risk-based concept" means "[s]ometimes we have to hurt people to make a profit." (*Id.* 4664-65.)

Plaintiffs' counsel then quoted from an unrelated portion of the same document referencing Spelter and nine other facilities around the country: East Chicago; Newport; Lordship; Pompton Lakes; Baileys; New Jersey; Washington Works; Antioch; and Lake Success. (*Id.* 4665-66.) He said that the people living near these sites "just like the people in this community, they feel that their health is more important than passing another dollar to the stockholder of DuPont." (*Id.* 4665.) Plaintiffs' counsel claimed that DuPont put together a "risk-based concept" at "every one" of these other sites (*id.*), and again equated this concept with the view that "sometimes it's okay to hurt people because it's better for the economy" (*id.* 4666). He compared this approach to "Exxon when they have a spill" and "a tobacco company when they say 'Cigarettes don't hurt people.'" (*Id.*)

DuPont moved for a mistrial based on Rule 404(b), citing Plaintiffs' inflammatory allegations regarding the company's conduct at plant sites around the country. (*Id.* 4722-26.) The Circuit Court denied DuPont's motion. (*Id.* 4728-29.)

The belated and inadequate Phase IV* McGinnis *"review." In the punitive damages phase of trial, the Circuit Court finally acknowledged that *McGinnis* required it to conduct an *in camera* hearing to address the other-acts allegations. Plaintiffs admitted that

the court had failed to conduct a *McGinnis* hearing up until that point, but agreed that an *in camera* review was required. (Binder 50, 10/16/07 Tr. 5136-37 (Plaintiffs' counsel's statement at the beginning of Phase IV: "[a]s far as the in camera review . . . that obviously hasn't been conducted at this point in time"); *id.* 5139.) The court's review, however, did not come close to satisfying the *McGinnis* requirements.

The court acknowledged that it had no advance notice of the 404(b) evidence Plaintiffs sought to use in Phase IV. (*Id.* 5138.) And the court conducted its "hearing" without actually reviewing the proffered evidence. It made no specific findings as to whether the alleged acts actually occurred. Instead, it simply declared that it had conducted the required *in camera* review "in general, and we've done it by representation—or by proffer or representation." (*Id.* 5181-82.) As this Court has warned, however, such a "review" renders the *McGinnis* safeguards meaningless: "The *in camera* hearing is rendered meaningless if a trial court is not informed specifically of the details surrounding each [act] and is not informed of which exception [to Rule 404(b)] is applicable." *State v. Dolin*, 176 W. Va. 688, 693-94, 347 S.E.2d 208, 214 (1986).

The Circuit Court compounded the error and prejudice by its purported "limiting instruction" during Phase IV. Referring to Parkersburg allegations that were central to Plaintiffs' Phase IV presentation, it said: "This evidence is not to be considered for the purpose of proving the character of DuPont, to show that it acted in conformity there with. It is, however, admissible for other purposes, such as intent, preparation, plan, knowledge or absence of mistake or accident." (Binder 50, 10/16/07 Tr. 5372.) But this Court has rejected this laundry-list approach to limiting instructions, explaining:

> It is not sufficient . . . merely to cite or mention the litany of possible uses listed in Rule 404(b). The *specific and precise purpose* for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Stafford, 198 W. Va. at 598, 482 S.E.2d at 215 (emphasis added); *see also McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. Plaintiffs never offered, and the court never required, any showing of a specific, legitimate purpose for the Parkersburg evidence and other allegations. The court permitted what Rule 404(b) and *McGinnis* prohibit.

Phase IV Parkersburg charges. The Circuit Court's refusal to apply the *McGinnis* safeguards permitted Plaintiffs to introduce a mountain of improper 404(b) evidence and allegations during the punitive damages phase of trial. In Phase IV, Parkersburg was the primary focus of Plaintiffs' case. (*See, e.g.*, Binder 50, 10/16/07 Tr. 5199-5244 (15 references to "Parkersburg" in Phase IV opening; only 14 to "Spelter").)

Plaintiffs' "evidence" about Parkersburg consisted of unproven, misleading, and highly prejudicial allegations of misconduct by DuPont, DEP, and others, none of which had anything to do with Plaintiffs' claims. For example, Plaintiffs made the inflammatory, unproven charge that DuPont had caused "birth defects" in the unborn child of a Parkersburg employee. (*Id.* 5203; Binder 50, 10/18/07 Tr. 5780.) Plaintiffs made misleading allegations about the results of C8 toxicology studies involving monkeys. (Binder 50, 10/16/07 Tr. 5394-95.) And Plaintiffs falsely charged that DuPont misled Parkersburg employees and the Parkersburg community about the potential risks of C8. (*E.g.*, *id.* 5224, 5400-01; *see also* Binder 50, 10/18/07 Tr. 5757-62 (refuting Plaintiffs' allegations).)

Plaintiffs introduced this evidence to suggest to the jury that because DuPont allegedly committed bad acts at Parkersburg, it likely did so at Spelter (Binder 50, 10/16/07 Tr. 5202-06, 5209, 5213, 5222, 5224)—the very sort of inference that Rule 404(b) forbids.

The court also permitted Plaintiffs to present evidence purporting to show that a DEP employee, DeeAnn Staats, "committed a crime when she destroyed records of a study of mysterious toxic chemicals that DuPont company has dumped into Wood County drinking water." (Binder 50, 10/17/07 Tr. 5491.) Again, the court never held an *in camera* hearing to determine whether these inflammatory allegations were true. Instead, it admitted the evidence in question based merely on Plaintiffs' counsel's representation to the court that "[i]t's no coincidence that Ms. DeeAnn Staats also is involved with the Spelter site." (Binder 50, 10/16/07 Tr. 5172.) Again and again, the court permitted Plaintiffs to attack DuPont based on allegations of misconduct related to Parkersburg in violation of Rule 404(b) and in disregard of *McGinnis*.

* * *

As this Court has emphasized, it is "inescapable that where a trial court erroneously admits Rule 404(b) evidence, prejudicial error is likely to result." *McGinnis*, 193 W. Va. at 153, 455 S.E.2d at 522 (citing *Virgin Islands v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976) ("Rule 404(b) evidence was wrongfully admitted and '[a] drop of ink cannot be removed from a glass of milk'")); *see also, e.g., Dolin*, 176 W. Va. at 692, 347 S.E.2d at 212-13 ("the admission of collateral crime evidence is highly prejudicial"). Plaintiffs were allowed to distract the jury from the significant shortcomings in their Spelter case by exposing the jury to inflammatory—and false—charges about DuPont's conduct at other

places. The Circuit Court's admission of these other-act charges in disregard of West Virginia law compels a new trial.

B. The Circuit Court Abused its Discretion by Allowing Dr. Brown to Testify Outside of His Area of Expertise

Plaintiffs' claims are based on the theory that the smelter "exposed" them and their properties to dangerous amounts of arsenic, cadmium, and lead. But there is extensive evidence that contaminant levels in the class area are below screening levels, which are protective and "clean." *See* pp. 10-11 *supra*. Plaintiffs did not call a medical doctor or toxicologist to address this environmental evidence and to assess any health risks. Instead, over DuPont's objections, the court permitted Plaintiffs to present as expert testimony the medical and toxicology opinions of Dr. Kirk Brown, a soil scientist.

By allowing Dr. Brown to provide medical and toxicology opinions, the court ignored its responsibility to ensure that purported experts have the training and knowledge necessary to help the jury. Far from assisting the jury, allowing an expert to roam far beyond his areas of expertise only confuses the jury and deprives the opposing party of a fair trial.

Brown's testimony was critical to Plaintiffs' case. The Circuit Court's error requires judgment for DuPont or, at a minimum, a new trial.

1. West Virginia law limits expert testimony to the expert's area of expertise

An expert witness must be "qualified . . . by knowledge, skill, experience, training, or education." W. Va. R. Evid. 702. This standard requires the trial court to ensure not only that a proposed witness is an expert in some field, but "that the expert has expertise *in the particular field in which he testifies*." *Gentry v. Mangum*, 195 W. Va. 512, 526, 466 S.E.2d 171, 185 (1995) (emphasis added); *see also State ex rel. Jones v. Recht*, 221 W. Va. 380, 386,

655 S.E.2d 126, 132 (2007) (though it was proper for the trial court to admit a surgeon's medical testimony, "the trial court was absolutely correct to exclude testimony regarding his opinion of the biomechanical components of the underlying civil action").

The obvious purpose of limiting expert testimony to subjects within the witness's field of expertise is to ensure that the expert's opinion will have a reliable basis. Only after the court makes this threshold admissibility determination can a jury receive the expert's testimony and weigh his or her credibility. Syl. Pt. 3, *Walker v. Sharma*, 221 W. Va. 559, 655 S.E.2d 775 (2007). Although this Court has liberally allowed qualified experts to testify *within* their areas of expertise, this case presents a different issue: the admissibility of opinions well outside a witness's field of expertise.

2. Brown's medical and toxicology testimony was far outside his area of expertise

Dr. Brown is a soil scientist. (Binder 41, 9/19/07 Tr. 2481-82.) His undergraduate and postgraduate degrees are in agronomy. (*Id.* 2484.) He is not a medical doctor, and he has no medical training. (*Id.*) He is not a toxicologist, and he has no experience in human toxicology. (*Id.* 2485-87.) He does not have any experience, training, or education in cancer and its causes. (*Id.* 2488.) The court purported to qualify Brown as an expert "within his areas of expertise and within the limits as expressed by him." (*Id.* 2490.)

Despite his lack of expertise in toxicology, medical causation, or human-health effects, the Circuit Court permitted Brown to give crucial "expert" opinions about these subjects, over DuPont's objections. (*E.g.*, *id.* 2494-95, 2563-65.) For example, Brown offered his opinions on the dose of arsenic that is lethal (*id.* 2495), types of cancer that arsenic

causes (*id.* 2495-96), types of cancer that cadmium causes (*id.* 2496), and the health effects of lead (*id.* 2495-97).

Brown also performed the health-risk assessment that was the indispensible premise for Plaintiffs' claims that medical monitoring and property remediation are necessary. To show "the probability of an individual getting cancer" (*id.* 2545), Brown first estimated contaminant exposures in the class area (*id.* 2540-43, 2545-46). Next, he offered his medical opinions, which included his calculations of the increased probability that class members would contract cancer based on estimated contaminant exposure and ingestion levels. (*Id.* 2540-43, 2545-46.) The court allowed Brown to opine to the jury that class members face increased health risks, including cancer risks as much as "1000 times greater than the minimum risk which is often considered by the regulatory community as being acceptable." (*Id.* 2545.)

This is not Brown's first attempt to testify outside of his area of expertise. Last year, a federal court barred him from testifying about toxicology and medical causation, explaining:

> Dr. Brown clearly crosses into the realm of toxicology and medical causation. He states that "[l]ead in the soil and house dust is the major source of contamination contributing to the elevated blood lead levels in children living in Picher and Cardin." . . . While Dr. Brown can testify how lead dust is transported from one place to another, the actual ingestion and elevation of blood lead levels is outside of his expertise. Toxicology is generally described as the study of how substances are absorbed into the body and the effect of substances on the human body.

Palmer v. Asarco, Inc., 2007 U.S. Dist. LEXIS 57846, at *31-32 (N.D. Okla. Aug. 7, 2007).

3. Because Plaintiffs had no case without Brown's testimony, the Circuit Court's error requires judgment for DuPont or, at minimum, a new trial

Brown's health-risk assessment testimony was critical to Plaintiffs' case. In Phase I, Plaintiffs admitted that Brown's testimony was the evidence "that really answers" the

question, "[d]id the contamination harm the property or the people in the class?" (Binder 42, 9/28/07 Tr. 3750-51.)

Brown's improper toxicology and medical opinions were also central to Plaintiffs' Phase II case for medical monitoring. His health-risk assessments were the foundation for Plaintiffs' claims of significant chemical exposure, health risks, and the need for medical monitoring. Plaintiffs' Phase II witness, Dr. Charles Werntz, admitted that the central assumption supporting his medical-monitoring plan—that the class members had an increased risk of disease—was not his independent opinion but based on "essentially adopting the work of Dr. Brown." (Binder 46, 10/2/07 Tr. 4143.)

In Phase III, the property remediation phase, Dr. Brown was Plaintiffs' only witness. Like Plaintiffs' Phase I and Phase II case, their Phase III case depended on Brown's toxicology and medical opinions. Brown created different property zones "derived from the cancer risk" that he determined (Binder 41, 9/19/07 Tr. 2559) and then prescribed varying levels of remediation by zone (Binder 46, 10/11/07 Tr. 4854).

In sum, the initial finding of liability, the rationale for medical monitoring, and the rationale for and design of the property-remediation plan all were based on Brown's toxicology and medical opinions—testimony that the Circuit Court erroneously admitted. Because there was no evidentiary basis for liability without Dr. Brown's testimony, this error requires judgment for DuPont, *see Weisgram v. Marley Co.*, 528 U.S. 448 (2000), or at least a new trial on all issues.

C. The Circuit Court Erroneously Allowed the Jury to Punish DuPont for its Constitutionally Protected Communications with Government Officials

The First Amendment to the U.S. Constitution and Article III, Section 16, of the West Virginia Constitution prohibit imposing liability for legitimate petitioning activity.[6] But that is what happened here. Over DuPont's objections, the Circuit Court allowed Plaintiffs to exhort the jury to punish DuPont for its communications with government regulators. These communications included DuPont's efforts to persuade DEP to accept the Spelter site into the VRRP. Allowing DuPont to be sanctioned for its petitioning activity undermined one of "the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

The "whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). The constitutional right to petition extends to lobbying of regulatory agencies. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). This bedrock right "bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs." *Webb v. Fury*, 167 W. Va. 434, 448, 282 S.E.2d 28, 37 (1981), *overruled in part by* Syl. Pt. 1, *Harris v. Adkins*, 189 W. Va. 465, 432 S.E.2d 549 (1993). The "clear import" of this rule is "to immunize from legal action persons who attempt to induce the passage or enforcement of law or to solicit governmental action even though the result of such activities may indirectly cause injury to others." *Harris*, 189 W. Va. at 467, 432 S.E.2d at 551 (quoting

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[6] The First Amendment guarantees the right to "petition the Government for a redress of grievances." Article III, Section 16, provides that "[t]he right of the people . . . to instruct their representatives, or to apply for redress of grievances, shall be held inviolate." These provisions are coextensive. *Harris v. Adkins*, 189 W. Va. 465, 468, 432 S.E.2d 549, 552 (1993).

Webb, 167 W. Va. at 445, 282 S.E.2d at 35); *see also State v. Berrill*, 196 W. Va. 578, 582, 474 S.E.2d 508, 512 (1996). Throughout the trial, the Circuit Court disregarded this bedrock constitutional principle.

DuPont's interactions with regulators were front and center in Plaintiffs' case. Plaintiffs declared that "the regulatory advocacy of DuPont is directly at issue in this case." (Binder 42, 9/27/07 Tr. 3635.) In their opening statement, Plaintiffs' counsel told the jury that the case had "to do with nothing but politics: Who you know, how much influence you have, who can you pick up the phone and make a call to." (Binder 40, 9/12/07 Tr. 888-89.)

Throughout the trial, Plaintiffs criticized DuPont for petitioning EPA to allow state regulators to take jurisdiction over the Spelter site, lobbying DEP to assume control over the Spelter remediation, and lobbying DEP regarding the nature and scope of the remediation. (*See id.* 903-04, 906; Binder 42, 9/28/07 Tr. 3738-48; Binder 50, 10/16/07 Tr. 5226-28; Binder 50, 10/18/07 Tr. 5685-90.) Plaintiffs argued to the jury that DuPont engaged in this lobbying "because they want to save money. And I'll tell you how they saved money: They saved money by playing politics." (Binder 40, 9/12/07 Tr. 900.) Plaintiffs urged the jury to pass judgment on these political efforts, asking: "Is that the kind of government you want for yourselves? Is that the kind of government these people are entitled to?" (Binder 42, 9/28/07 Tr. 3745.)

Although Plaintiffs' attacks on DuPont's protected conduct permeated the trial, the prejudice was especially acute in the punitive-damages phase. Plaintiffs argued that DuPont's interactions with DEP constituted "wanton[], willful[], or reckless[]" activity that merited punishment. (Binder 45, p. 20717, Pls.' Mot. to Allow Jury to Decide Whether Punitive Damages are Appropriate at 7-10 (10/12/07).) They clearly announced their

purpose in attacking DuPont's petitioning activities: "[T]he incentive we want to discourage are DuPont's actions in going to the DEP because of the close ties they had with the DEP, knowing that they could move those regulators in the ways they wanted to move them." (Binder 50, 10/15/07 Tr. 5062.) In keeping with this theme, Plaintiffs explicitly asked the jury to punish DuPont's petitioning efforts to send a message to other companies that might consider asking the state government for regulatory help:

> You have to say to yourself, is that the kind of conduct that you want to take—that you want to agree to in the state? That's the simple issue here. *That's what this whole segment is about.* It's to say, you can overcome bad legislators, you can overcome bad regulators, you have overcome a company that's a renegade company, and you can make a change by what you do here.

(Binder 50, 10/16/2007 Tr. 5230 (emphasis added).)

Punishing DuPont for petitioning violates the First Amendment.[7] That DuPont's petitioning may have been motivated by a desire to limit its financial exposure makes no difference. The "right of the people to petition their representatives in government 'cannot properly be made to depend on their intent in doing so.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Noerr*, 365 U.S. at 139). It "is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." *Noerr*, 365 U.S. at 139.

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[7] The Petition Clause does not protect independently unlawful activities, such as bribery of public officials. But Plaintiffs never claimed—and there is no evidence—that DuPont's petitioning conduct was unlawful. The Circuit Court's holding that Plaintiffs were free to present "evidence of DuPont's purported *manipulation*" of state and federal agencies (Binder 54, p. 24953, Order Den. Mot. for New Trial at 12 (2/25/08) (emphasis added)) misses the critical distinction between independently unlawful activities, which are not protected, and legitimate petitioning activities, which are protected regardless of their purpose or effect. The Circuit Court left the jury free to punish DuPont for protected conduct simply because that conduct sought an outcome that the jury found undesirable. The Constitution forbids that result. *See Harris*, 189 W. Va. at 467, 432 S.E.2d at 551.

Plaintiffs say that they injected DuPont's petitioning activity into the trial only to rebut DuPont's reliance on EPA and DEP oversight and approval of the remediation. The Circuit Court accepted this argument, signing the order that Plaintiffs' proposed. (Binder 54, p. 24953, Order Den. Mot. for New Trial at 12 (2/25/08).) But the record disproves it.

Plaintiffs did not limit their use of petitioning-related evidence to impeachment or rebuttal. Again and again, Plaintiffs affirmatively argued that DuPont should be found liable and punished for its efforts to seek favorable regulatory action. They urged the jury to impose punitive damages in order to condemn DEP for responding to DuPont's petitioning efforts, stating that they "hope[d] [that] part of the message that goes out of here is for everybody in this state that [DEP Director] Timmermeyer cannot be trusted to take care of your state for you." (Binder 50, 10/16/07 Tr. 5227.) Plaintiffs aimed to punish DuPont for petitioning government regulators and to deter other companies from engaging in similar lobbying efforts. (*Id.* 5232.) The Constitution forbids using punishment to chill the exercise of constitutional rights.

Had Plaintiffs limited their use of DuPont's petitioning to impeachment or rebuttal, the law would have required carefully drawn limiting instructions. But the court never gave such an instruction. Once the court allowed Plaintiffs to make petitioning a central trial theme, DuPont asked the court to tell the jury that it could consider such evidence only for limited purposes. (*See* Binder 42, p. 19349, DuPont's Obj. to Instr., Nos. 33-34 (9/28/07); Binder 50, p. 23140, DuPont's Obj. to Phase IV Instr., Nos. 18-19 (10/18/07).) But the court refused to instruct the jury that the law required it to distinguish between the supposedly permissible and the plainly impermissible uses of evidence relating to DuPont's petitioning. As a result, the jury's verdicts (particularly its punitive damages verdict) lack the "precision of regulation" that the First Amendment demands when state courts seek to impose liability for

conduct that occurs "in the context of constitutionally protected activity." *Claiborne Hardware*, 458 U.S. at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

II. The Circuit Court Erroneously Impaired DuPont's Defense

In addition to allowing Plaintiffs to present inadmissible evidence and improper attacks, the court erroneously impaired DuPont's trial defense by: (a) granting summary judgment *sua sponte* against DuPont on the statute of limitations as to all class members; (b) granting summary judgment against DuPont on co-defendant Diamond's indemnification claim against DuPont; and (c) barring DuPont from introducing individualized evidence to disprove the class representatives' claims.

A. The Circuit Court Erroneously Barred DuPont from Presenting its Statute-of-Limitations Defense to the Jury

DuPont proffered substantial evidence that Plaintiffs' claims are barred by the two-year statute of limitations. This included evidence about media reports, general public awareness, and a series of well-attended community meetings with lawyers (including some of the lawyers who eventually represented Plaintiffs) discussing alleged smelter contamination. This evidence shows class members' long-held, widespread knowledge of their claims. At the very least, this evidence created a jury issue on the timeliness of Plaintiffs' claims. Yet the Circuit Court prevented DuPont from presenting any limitations defense to the jury. Instead, *on its own motion*, the court ruled that all class members' claims were timely as a matter of law. This ruling, which summarily eliminated one of DuPont's central defenses, was a flagrant error that requires a new trial.

1. The statute of limitations began to run when Plaintiffs knew or should have known of their claims

West Virginia law required Plaintiffs to bring their causes of action "[w]ithin two years next after the right to bring the same shall have accrued." W. Va. Code § 55-2-12. Although "the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim," *State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 455, 607 S.E.2d 772, 784 (2004) (internal quotation marks omitted), "mere ignorance of the existence of a cause of action . . . does not prevent the running of the statute of limitations," *Cart v. Marcum*, 188 W. Va. 241, 245, 423 S.E.2d 644, 648 (1992).[8]

2. There is substantial evidence that Plaintiffs knew or should have known of their claims more than two years before they sued

Plaintiffs filed suit in June 2004, more than two years after all smelter operations had ceased and more than half a century after DuPont last operated the smelter. There is substantial evidence that, before June 2002, Plaintiffs knew or should have known of their claims.

Media reports of alleged hazards. Extensive media coverage of allegations that waste from the Spelter facility had migrated to surrounding properties provided Plaintiffs actual or constructive knowledge of their claims before 2002. For example, class representative Lenora Perrine admitted that in 1997 she read and retained a *Clarksburg Exponent* article that discussed alleged facts that are the basis of Plaintiffs' claims. (Binder 41, p. 18684, 11/16/05 Perrine Dep. Tr. 198-99, 207, Ex. B to DuPont's Proffer (9/26/07).) Other class members also admitted

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[8] Plaintiffs say that the federal commencement date, not West Virginia's, governs their claims. But the federal date applies only if the state limitations period commences "earlier than the federally required commencement date." 42 U.S.C. § 9658(a)(1). That is not the case here. Rather, West Virginia's standard mirrors the federal standard, under which the statute of limitations does not begin to run until the plaintiffs "knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance." *Id.* § 9658(b)(4)(A). In any event, applying the federal standard would not eliminate the factual dispute that makes summary judgment erroneous.

reading this article in 1997. (*E.g.*, Binder 41, p. 18684, 5/22/07 Quinones Dep. Tr. 103, Ex. A to 9/26/07 Proffer.)

This 1997 article, entitled "Residents Say Spelter's Slag Pile Has To Go," described the Spelter site as containing a "70 foot hazardous waste pile," which "all" residents agree is "a health hazard." (Binder 41, p. 18684, Ex. V to 9/26/07 Proffer.) It reported that EPA and DEP tests showed that the pile "contains lead, arsenic and cadmium," which the article described as "dangerous elements." (*Id.*) The article further reported that "air borne particles have the potential to harm people through inhalation or ingestion." (*Id.*) It identified DuPont as a former plant owner. (*Id.*)

Before 2002, these and many similar media reports of alleged hazards of the smelter site were published in the class area. These reports show that Plaintiffs had or should have had knowledge of their claims long before June 2002.[9] Especially when viewed in the light most favorable to DuPont, as required, this evidence at least creates genuine issues of fact that preclude summary judgment. *See, e.g., O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1154 (9th Cir. 2002) ("Whether Plaintiffs would have suspected on the basis of these media reports that Defendants' contamination caused their injuries, in light of the evidence that the parties presented, is fundamentally a question of fact.").

Community meetings with lawyers. As early as 2000 and 2001, Plaintiffs and their lawyers organized and attended a series of community meetings to discuss alleged contamination

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[9] Plaintiffs say that these media reports, combined with DuPont's denial of liability, created uncertainty that tolled the statute of limitations. But a defendant's denials of liability do not toll an otherwise triggered limitations period. *E.g., LaBauve v. Olin Corp.*, 231 F.R.D. 632, 654-55 (S.D. Ala. 2005). Plaintiffs' assertions at best created a triable issue of fact for the jury. Both cases that Plaintiffs rely on, *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176 (2d Cir. 2002), and *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139 (9th Cir. 2002), found triable issues of fact and reversed summary judgment on the statute of limitations.

from the smelter site and possible legal action. (*See* Binder 41, p. 18684, 12/12/06 Simoni Dep. Tr. 49-50, 190-92, 195, 239, 243-44, Ex. C to 9/26/07 Proffer; Binder 41, p. 18684, 5/22/07 Quinones Dep. Tr. 107-08, Ex. A to 9/26/07 Proffer.) Mrs. Perrine herself hosted one such meeting in December 2000 relating to the "pile next door that . . . apparently had some contamination in it." (Binder 41, p. 18684, 12/12/06 Simoni Dep. Tr. 184, Ex. C to 9/26/07 Proffer.) She believed that the smelter reduced local property values. (11/16/05 Perrine Dep. Tr. at 204, Ex. B to 9/26/07 Proffer.)

Lawyers attended these meeting. These included lawyers who eventually served as Plaintiffs' counsel in this case, for example, Gary Rich, who later signed Plaintiffs' complaint and appeared for Plaintiffs at trial. (Binder 41, p. 18684, 12/12/06 Simoni Dep. Tr. 193, Ex. C to 9/26/07 Proffer; Binder 41, p. 18684, 5/22/07 W. Perrine Dep. Tr. 78-79, Ex. D to 9/26/07 Proffer.) Jan Schlichtmann, a lawyer featured in *A Civil Action* who is associated with the Levin Papantonio firm, also attended. (Binder 41, p. 18684, 8/16/07 Simoni Dep. Tr. 420-21, Ex. C to 9/26/07 Proffer.) Some residents who attended these meetings, including some class members, had *already* "signed representation agreements with Mr. Rich." (*See* Binder 50, p. 23232, Letter from J. Bedell to Dodds (11/5/07) (attaching 6/9/01 "Attorney Retainer Agreement"); Binder 41, p. 18684, 12/12/06 Simoni Dep. Tr. 243-44, Ex. C to 9/26/07 Proffer.)

Mr. Rich also attended a 2001 community meeting about the smelter. (*See* Binder 41, p. 18684, 4/30/01 Notes, Ex. Y to 9/26/07 Proffer.) Notes from this meeting describe "the presence of Pb [lead], Cd [cadmium], and As [arsenic]" and make clear that "[s]ome of the residents think that their health problems are related to living near the slag pile." (*Id.*) This evidence should have precluded the court from taking the limitations issue away from the jury.

See, e.g., *O'Connor*, 311 F.3d at 1152 ("[E]valuation of the awareness in Plaintiffs' various communities of a specific fact or event was uniquely an issue for the jury to resolve.").

3. The Circuit Court erroneously barred DuPont from presenting its limitations defense

Despite this substantial evidence that class members had actual or constructive knowledge that rendered their claims time-barred, the Circuit Court held *sua sponte* that "as a matter of law" every class member "lacked knowledge sufficient to trigger the running of the statute of limitations" and that "none of plaintiffs' claims is time-barred." (Binder 40, p. 18374, Order on DuPont's Mot. for Summ. J. at 3-5 (9/14/07).) The court took this action—which decided disputed factual issues as to the entirety of both classes—even though Plaintiffs themselves had not moved for summary judgment and had argued that the jury should decide the statute-of-limitations issue.

The Circuit Court twice confirmed its remarkable decision at trial, first when it refused to allow DuPont to present any statute-of-limitations evidence to the jury, and again at the end of Phase I when it denied DuPont's motion to reopen the evidence to present its limitations defense. (Binder 42, 9/26/07 Tr. 3600-01; Binder 42, 9/28/07 Tr. 3663-64.) These rulings were manifestly erroneous.

To begin with, in granting summary judgment *sua sponte*, the Circuit court disregarded the rule that "[o]rdinarily, in the absence of a written motion for summary judgment by one of the parties, the court is not authorized [*s*]*ua sponte* to grant a summary judgment." Syl. Pt. 2, *Gavitt v. Swiger*, 162 W. Va. 238, 248 S.E.2d 848 (1978) (reversing summary judgment for plaintiffs).

The Circuit Court's departure from this well-established rule was all the more problematic because it occurred in the context of a fact-intensive statute-of-limitations issue. *See Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997) ("In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury."); *Barney v. Auvil*, 195 W. Va. 733, 740, 466 S.E.2d 801, 808 (1995) ("[T]he circuit court should have . . . submitted the factual issue concerning the running of the statute of limitations to the jury."). Plaintiffs have failed to cite a single case affirming summary judgment, much less approving of a court's *sua sponte* grant of summary judgment, on a limitations defense.

The Circuit Court concluded that Plaintiffs' claims did not accrue until December 2003, when an expert report on contamination in the Spelter area—commissioned by Plaintiffs' counsel—was circulated. (Binder 54, p. 24953, Order Den. New Trial at 3-4 (2/25/08).) This reasoning confirms the court's error. First, "bedrock precedent" provides that "the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she knows of the particular nature of the injury." *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005). The federal standard that Plaintiffs invoke is not materially different, requiring only that Plaintiffs have knowledge that contamination from the smelter contributed to their damages.[10]

Second, "the lack of an expert opinion supporting causation does not prevent commencement of the statute of limitations under the principle of inquiry notice." *Ranney v.*

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[10] 42 U.S.C. § 9658(b)(4)(A); *see also LaBauve*, 231 F.R.D. at 654 ("[T]he critical legal inquiry for purposes of establishing when the limitations period began to run for plaintiff . . . is when she 'reasonably should have known' that her property had been damaged by industrial contamination from the . . . site."); *Presque Isle Harbor Dev. Co. v. Dow Chem. Co.*, 875 F. Supp. 1312, 1319 n.11 (W.D. Mich. 1995) (plaintiffs' argument that the federal standard requires specific knowledge of the hazardous substances is "wholly without merit").

Parawax Co., 582 N.W.2d 152, 155-56 (Iowa 1998); *see also LaBauve v. Olin Corp.*, 231 F.R.D. 632, 659-61 & n.59 (S.D. Ala. 2005) (rejecting the contention that the statute of limitations did not begin to run until receipt of expert's test because "[t]he law is clear that the 'reasonably should have known' test under the FRCD does not permit a party to await certainty") (internal quotation marks omitted). Requiring an opinion from a retained expert as a prerequisite to the accrual of a cause of action for environmental harm would eviscerate the statute of limitations. Plaintiffs could delay indefinitely, and defendants would be vulnerable to suit in perpetuity, until plaintiffs initiated and completed an expert investigation that supported their allegations.

By foreclosing DuPont's statute-of-limitations defense, the court usurped the jury's proper function and deprived DuPont of a central defense. This error entitles DuPont to a new trial.

B. The Circuit Court Erroneously Required DuPont to Stand Responsible for T.L. Diamond's Conduct and to Indemnify it for Plaintiffs' Claims

Before trial, the Circuit Court short-circuited DuPont's defense in another way: it required DuPont to indemnify Diamond for its liabilities to Plaintiffs and to reimburse Diamond for litigation costs. That ruling was based on a flawed interpretation of a contract between DuPont and Diamond. The ruling not only obliged DuPont to pay over $800,000 of Diamond's expenses, but also fundamentally altered DuPont's trial strategy by effectively precluding it from showing that Diamond bore much of the responsibility for any injuries Plaintiffs may have suffered. This error entitles DuPont to a new trial. This Court's review is *de novo*. *Energy Dev. Corp. v. Moss*, 214 W. Va. 577, 583, 591 S.E.2d 135, 141 (2003).

In 2001, DuPont purchased the smelter property from Diamond. DuPont's purchase of the site facilitated completion of the remediation by ensuring that smelting operations would cease and that DuPont could carry out the remaining remediation work. (DX 779.)

On October 29, 2001, DuPont and Diamond executed an Environmental and Sale Agreement ("Sale Agreement").[11] In light of the ongoing remediation, a primary purpose of the Sale Agreement was "to clarify [the parties'] respective responsibilities related to the environmental condition of the Property." (Preamble, cl. 6.) The Sale Agreement includes three distinct provisions relating to the allocation of liability. Paragraph 5 addresses the environmental condition of the smelter-site property:

> [A]s between TLD and DuPont, DuPont shall be solely liable for the past, current and future environmental condition of the Real Property, including, but not limited to: (a) any obligations pursuant to the Voluntary Remediation Agreement; . . . [and] (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property.

Paragraph 6, in contrast, is a release by DuPont of certain claims against Diamond:

> DuPont shall release TLD . . . from and against any and all losses, claims, demands, liabilities, obligations, causes of action, damages, costs, expenses, fines or penalties (including, without limitations, attorney and consultant fees) arising out of the past, current or future environmental condition of the Real Property, including, but not limited to: (a) any obligations pursuant to the Voluntary Remediation Agreement; . . . [and] (c) any liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property.

Finally, Paragraph 8 describes the narrow set of circumstances under which DuPont would be liable for Diamond's defense or a judgment against Diamond:

> DuPont shall take no action to include, or that leads any other person to include, TLD in any judicial or administrative proceeding relating to a Released Claim. If DuPont takes any such action, DuPont shall be solely liable for the defense of TLD in such proceeding and for the payment of any judgment entered against TLD in such proceeding.

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[11] DuPont attached the Sale Agreement as Exhibit 1 to its Petition for Appeal from Orders Requiring DuPont to Indemnify T.L. Diamond (6/16/08).

When Plaintiffs filed this action in June 2004, they sued DuPont, Diamond, and others. In its Answer, Diamond asserted cross-claims against DuPont, including an express indemnification claim allegedly arising out of the Sale Agreement.

In November 2006, Diamond entered an agreement with Plaintiffs. By this agreement, Diamond assigned its rights under the Sale Agreement to Plaintiffs; in return, Plaintiffs agreed to forgo execution of a judgment against Diamond that would bankrupt it. (Binder 24, p. 10212, Ex. B to Pls.' Mot. for Summ. J. re Diamond (7/9/07).) Shortly before trial, Plaintiffs moved for summary judgment on Diamond's express indemnification cross-claim; DuPont also sought summary judgment on the issue. The Circuit Court granted Plaintiffs' motion and denied DuPont's.

The court construed the Sale Agreement to require DuPont "to reimburse T.L. Diamond for all such costs, expenses, attorney fees and consultant fees so incurred in this matter." (Binder 40, p. 18362, Order Granting Summ. J. re DuPont's Duty to Indemnify Diamond ("Diamond Order") at 9 (9/14/07).) The court also ruled that DuPont was obligated "to indemnify T.L. Diamond against any liability against it in the instant litigation." (*Id.* 10.)

The court's ruling that DuPont was responsible for Diamond, which significantly damaged DuPont's trial defense, was erroneous.

1. The Circuit Court's indemnification ruling disregarded West Virginia law and distorted the parties' Sale Agreement

a. The Sale Agreement does not require DuPont to indemnify Diamond for Diamond's own negligence

"In construing a contract of indemnity and determining the rights and liabilities of the parties thereunder, the primary purpose is to ascertain and give effect to the intention of the

parties." *Sellers v. Owens-Illinois Glass Co.*, 156 W. Va. 87, 92-93, 191 S.E.2d 166, 169 (1972). This Court has made clear that "to relieve a party from liability for his own negligence by contract, language to that effect must be clear and definite." *Id.* at 93, 191 S.E.2d at 170 (quoting *Bowlby-Harmon Lumber Co. v. Commodore Servs., Inc.*, 144 W. Va. 239, 248, 107 S.E.2d 602, 607 (1959)). This rule is a corollary to the more general principle that indemnification contracts "must clearly and definitely show an intention to indemnify against a certain loss or liability." *Sellers*, 156 W. Va. at 92, 191 S.E.2d at 169.

These principles articulated in *Sellers*, which the Circuit Court failed even to mention, are decisive. Plaintiffs' claims against Diamond were based on allegations that Diamond's conduct was negligent or worse. (*E.g.*, Second Am. Compl. (8/31/05) (alleging against Diamond claims including negligence and recklessness, negligence per se, and punitive damages).) As Diamond stated in its indemnification cross-claim: "Plaintiffs' Complaint alleges plaintiffs' damages were the result of negligent, reckless, deliberate and/or unlawful conduct of defendant T.L. Diamond." (Am. Ans. & Cross-Claim of Def. T.L. Diamond at 21 (9/14/05).) In ordering DuPont to indemnify Diamond for those claims, and to reimburse Diamond for defense fees and costs, the court required DuPont to protect Diamond from the consequences of Diamond's own wrongdoing. But that result finds no support, much less express provision, in the Sale Agreement.

Paragraph 5 provides that DuPont "shall be solely liable for . . . any liabilities related to the offsite migration of soil, sediment, groundwater or surface water from the Real Property." That provision says nothing about Diamond's negligence. It is not a statement, much less a "clear and definite one" as required by *Sellers*, that DuPont would relieve Diamond of the consequences of Diamond's wrongful conduct.

Other courts have held that indemnification language similar to—and more expansive than—Paragraph 5 does not absolve a party of its own negligence. For example, the U.S. Court of Appeals for the Seventh Circuit has rejected as "contrary to settled doctrine" the contention that a contract making an indemnitor "solely liable" for "all claims involving bodily injury, property damage, and worker's compensation" required indemnification for negligence. *Sutton v. A.O. Smith Co.*, 165 F.3d 561, 563-64 (7th Cir. 1999). Similarly, the Florida Supreme Court has held that even broader language—to "indemnify, protect and save the [other] forever harmless from and against any and all claims and demands for damages"—was "legally insufficient to provide indemnity" for negligence. *Cox Cable Corp. v. Gulf Power Co.*, 591 So. 2d 627, 629 (Fla. 1992).

These cases confirm that the Circuit Court erred in requiring DuPont to indemnify Diamond for its own negligence in the absence of clear and definite contractual language relieving Diamond of its wrongful conduct, as required by *Sellers*.

b. The court erroneously relied on a separate release provision to construe DuPont's indemnification obligation

Beyond its disregard for *Sellers*, the Circuit Court erred in its construction of the Sale Agreement. The court found DuPont to have indemnification obligations by virtue of Paragraph 6 of the Sale Agreement. (Binder 40, p. 18362, Diamond Order at 7-8.) But Paragraph 6 is not an indemnification provision, it is a release. That distinction is fundamental, and the court's error here is independently fatal to its ruling.

An "indemnity clause" is a "contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur." *Black's Law Dictionary* (8th ed. 2004). A "release," in contrast, involves "giving up a right or claim to the person against whom it could have been enforced." *Id.* Because a party cannot surrender claims

that belong to someone else, a release applies only to claims brought by the party providing the release. "An agreement to sign a release contemplates only a release from liability and not indemnification from third-party claims." 42 C.J.S. Indemnity § 3; *see also, e.g.*, *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 107 (Ky. 2003).

Accordingly, Paragraphs 5 and 6 address fundamentally different sets of liabilities. Because Paragraph 6, the release, is limited to claims that DuPont itself could have asserted against Diamond, it cannot support an obligation to indemnify Diamond in connection with claims brought by third parties. The Circuit Court ignored this fundamental distinction. It read Paragraphs 5 and 6 "together" to create an indemnification obligation coextensive with the scope of the release in Paragraph 6. (Binder 40, p. 18362, Diamond Order at 7-8.) The court's reliance on the broader *release* provision to find that DuPont was required to *indemnify* Diamond against claims such as those of Plaintiffs here (*id.* at 9) was clear error.

The court reasoned that the word "against" in Paragraph 6 "connotes protection, not merely relinquishment" and thus transformed Paragraph 6 from a standard release into a sweeping protection against third-party claims. (*Id.* at 7.) But the phrase "from and against" is release boilerplate. It appears in a wide variety of releases and has not been interpreted to broaden their scope, much less transform them into indemnities.[12] As this court long ago explained, contractual formulations that have a "definite legal signification" are to be interpreted "in the sense in which they are generally understood." *Minor v. Pursglove Coal Mining Co.*, 111 W. Va. 28, 161 S.E. 425, 426 (1931).

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[12] *See, e.g.*, *Foufas v. Dru*, 319 F.3d 284, 285 (7th Cir. 2003) (describing as a "release" a provision requiring parties to release each other "from and against any and all claims, rights, debts"); *Heritage Creek Dev. Corp. v. Colonial Bank*, 268 Ga. App. 369, 373, 601 S.E.2d 842, 846 (2004); *Nickles v. Auntie Margaret Daycare, Corp.*, 829 S.W.2d 614, 615 (Mo. App. 1992); *Baker Pac. Corp. v. Suttles*, 220 Cal. App. 3d 1148, 1152-53, 269 Cal. Rptr. 709, 711-12 (1990) (stating, with respect to a contract using the "from and against" formula, that there could hardly be a "clearer" release).

The court's transformation of a release into an indemnity deviated from this long-standing principle, distorted the Sale Agreement, and subverted the parties' expectations.

c. The court impermissibly disregarded paragraph 8 of the Sale Agreement in determining DuPont's indemnification obligation

Paragraph 8 further confirms that the Circuit Court committed interpretive error. Like Paragraph 5, Paragraph 8 is a sole liability provision. But Paragraph 8 is conditional; it imposes obligations on DuPont *only if* DuPont takes any action "to include, or that leads any other person to include, TLD in any judicial or administrative proceeding related to a Released Claim."[13] When liability is triggered under this provision, the obligation imposed is specific: "DuPont shall be solely liable *for the defense of TLD* in such proceeding, and for the *payment of any judgment* entered against TLD in such proceeding."

Paragraph 8 shows that the parties knew how to draft a sole liability clause that would make DuPont liable for debts incurred by Diamond in connection with claims brought by others and that they did not choose to do so in Paragraph 5. Paragraph 8 also demonstrates that the drafters could define with precision two specific kinds of liabilities DuPont would assume if that provision was triggered: the cost of Diamond's defense and any adverse judgment. Here again, the contrast with Paragraph 5 is stark; that provision contains neither obligation.

The Circuit Court mentioned Paragraph 8 in passing, but concluded, without further analysis, that Paragraph 8 had no bearing on the scope of Paragraph 5. (Binder 40, p. 18362, Diamond Order at 5, 8.) That was error. A contract can be given effect in its entirety, as West Virginia law requires, only if material differences in the text of otherwise similar provisions are treated as imposing different obligations. As this Court has said, "an accepted canon of

[13] The term "Released Claim" is defined in Paragraph 6 to track the scope of the claims that DuPont agreed to surrender as against Diamond.

construction forbids the balkanization of contracts for interpretive purposes." *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont*, 196 W. Va. 97, 103, 468 S.E.2d 712, 718 (1996); *see also Moore v. Johnson Serv. Co.*, 158 W. Va. 808, 817, 219 S.E.2d 315, 321 (1975) ("in the construction of contracts, words or clauses are not to be treated as meaningless or discarded if any reasonable meaning consistent with the other parts of the contract can be given them").

In this case, these principles point to only one conclusion. Giving effect to Paragraph 8 requires interpreting Paragraph 5 not to make DuPont "solely liable" in connection with a Released Claim—and not to make DuPont liable for Diamond's defense of such a claim. Paragraph 8 goes out of its way to make clear that DuPont's liability for Diamond's defense in connection with a Released Claim is triggered only if DuPont itself includes or causes someone else to include Diamond in a judicial proceeding. If Paragraph 5 (despite its omission of any such language) already made DuPont liable for Diamond's defense and for the payment of judgments entered against Diamond, there would be no reason for Paragraph 8 to identify those same obligations as the consequences of DuPont suing Diamond or causing it to be sued.

DuPont took no action that led to Diamond's inclusion as a defendant in this case. The Circuit Court certainly made no such finding. Accordingly, the basic condition that the Sale Agreement sets out for making DuPont "liable for the defense" of Diamond has not been satisfied.

d. This case did not involve migration of soil, sediment, or water

The Circuit Court's indemnification ruling was wrong for an additional, independent reason. It was dependent on the incorrect premise that this case involves "the off-site migration of soil, sediment, groundwater or surface water." (Binder 40, p. 18362, Diamond Order at 8.) In fact, however, Plaintiffs' claims are based on the *airborne* transmission of certain chemical

byproducts of the zinc smelting process that formerly occurred on that property. Such airborne emissions from the smelter are not covered by the Sale Agreement.

The omission of airborne transmission of contaminants follows from the fact that the primary purpose of the Sale Agreement was to allocate responsibility between DuPont and Diamond for the remediation, not to shift responsibility for third-party claims arising from the smelter's historical operations. Thus, even assuming that Paragraph 5 did somehow require DuPont to indemnify Diamond for some category of legal claims, Plaintiffs' claims still would fall outside the scope of any such obligation.

As the Complaint itself makes clear, Plaintiffs' claims were premised on the alleged movement of contaminants from the smelter to the class area through air and wind. (*See* Second Am. Compl. ¶ 1 (alleging that Plaintiffs' injuries were caused by "hazardous substances released as a result of Defendants' conduct at the former zinc production facility"); ¶ 3 (alleging that Plaintiffs' properties were contaminated "with hazardous substances contained within dust, smoke, and/or other releases from the Spelter Smelter facility").) Plaintiffs similarly contended that class certification was based upon air pollution and the airborne migration of contaminants. (5/01/06 Class Cert. Tr. 26-27.)

That Plaintiffs' claims were based on airborne migration of contaminants was confirmed at trial. Plaintiffs' expert witnesses testified that the movement of arsenic, cadmium, and lead from the Spelter facility to the class area was predominantly airborne. Plaintiffs made no effort to prove that alternative pathways were the cause of alleged exposure of the class to arsenic, cadmium, and lead. According to Plaintiffs' expert Dr. Brown:

> Wind was a major factor in transporting and dispersing the emitted dust from the smelter and the residue pile. Wind also acted as a scouring agent, dislodging fine particulates containing toxic metals from the residue pile for transport.

> Particulates emitted from the smelter stack, bag house, and retort buildings as well as the waste pile were blown as dust onto the properties and into homes throughout the [Class Area]. As a result of this wind blown dust, the homes and properties . . . were contaminated with toxic metals from the site.

(Binder 20, p. 8763, Brown Report at 6-7 (4/2/07).) Brown testified similarly at trial. (*See, e.g.*, Binder 41, 9/19/07 Tr. 2520, 2525, 2529, 2537-38.)

Such claims do not constitute "liabilities related to the off-site migration of soil, sediment, groundwater or surface water from the Real Property."

2. The Circuit Court's pre-trial indemnification ruling fundamentally altered DuPont's trial strategy

The court's indemnification ruling upended DuPont's trial defense. Faced with a broad duty to take responsibility for Diamond's conduct, DuPont could not productively contrast its tenure as the plant owner-operator with Diamond's. During its tenure from 1928-50, DuPont upgraded the plant technology, created a cleaner operation, and operated the plant in accordance with industry standards. (Binder 40, 9/13/07 Tr. 1165; Binder 42, 9/24/07 Tr. 2923-26.) Diamond's 1971-2001 tenure, on the other hand, was characterized by numerous emissions complaints and regulatory violations. (*See, e.g.*, PX 362, 364, 373-74, 379.)

The court's ruling effectively transformed Diamond's conduct into DuPont's. The jury ultimately found that Diamond had contributed to the exposure of all residents or property to arsenic, cadmium, or lead, but determined that Diamond was 0 percent responsible. Such an incongruous verdict never could have been returned had the Circuit Court not misread the Sale Agreement to make DuPont responsible for Diamond's negligence. Accordingly, this Court should reverse the Circuit Court's summary judgment order, reverse its post-trial order requiring DuPont to reimburse Diamond for $814,949.37 in costs and expenses (Binder 54, p. 24916, Final J. Order re Diamond at 2 (2/15/08)), and grant a new trial on all other issues.

C. Trying this Case as a Class Action Violated Due Process by Preventing DuPont from Presenting Individualized Defenses

The court further impaired DuPont's trial defense by mishandling this case as a class action. As was clear even before trial, individualized issues should have precluded class certification of this action. But the Circuit Court certified the classes anyway.

Events after class certification confirmed that the case could not be tried as a class action without violating DuPont's state and federal due process rights. But the Circuit Court refused to decertify the class. Instead, it precluded DuPont from introducing individualized evidence and advancing individualized defenses in order to maintain the case as a class action. In so doing, the court subverted the very idea of class-action litigation and violated DuPont's due process right to present a defense. This constitutional error requires a new trial.

1. Class certification was improper

The Circuit Court certified two classes of partially overlapping plaintiffs: (1) property owners within a five-by-seven mile area surrounding the Spelter facility; and (2) residents who have lived in one of three "zones" within the same area for certain minimum time periods within the last 40 years. Each class sought a different remedy: The property class sought property damages; the medical-monitoring class sought medical monitoring.

In certifying these joint classes, the Circuit Court ignored enormous variations among thousands of class members and among the thousands of properties in the class area. These variations went to critical issues such as:

(1) The extent to which class members actually were exposed to any arsenic, cadmium, or lead;[14]

[14] For example, even though Plaintiffs sought medical monitoring based on alleged *chronic* exposures to arsenic, cadmium, and lead (*see, e.g.*, Binder 42, 9/24/07 Tr. 2983), the class lumped together individuals like class representative Lenora Perrine, who had lived in Spelter for 64 years (*id.* 3098), with others who had spent as little as one year in the area.

(2) The amount, if any, of those substances on class members' properties or in their bodies;

(3) The alleged causal relationship between the smelter and class members' claimed property damage or increased risk of injury; and

(4) When the various class members knew sufficient facts about their potential claims to begin the running of the statute of limitations for their claims.

Those individual variations alone should have precluded class treatment.

On the central issue of exposure, the trial evidence showed not only variation, but a failure of class-wide proof. *See* pp. 10-11 *supra.* The court should not have allowed a class action to proceed and recover damages in the face of evidence showing that whatever exposure existed was highly individualized.

2. The Circuit Court maintained class treatment at the expense of a fair trial by excluding class-representative-specific evidence

The court's trial rulings confirmed that class treatment was inappropriate. A central part of DuPont's defense was to offer evidence about each of the ten class representatives to illustrate the weaknesses of their claims. But the court excluded this evidence on the ground that it was irrelevant to the class as a whole. That reasoning should have caused the court to decertify the class, not to bar DuPont from presenting a valid defense.

The Circuit Court erroneously excluded all evidence of class representative Lenora Perrine's normal blood-lead test. In 2005, class representative Lenora Perrine, who had lived near the Spelter plant site for decades, had a blood-lead test, which showed that she had a normal blood-lead level, below any level of concern. This evidence would have directly refuted Plaintiffs' expert Dr. Brown, who claimed that, despite DuPont's remediation of the plant site, hazardous exposure to contaminants was ongoing in the class area. (*E.g.*, Binder 41, 9/20/07 Tr. 2609-10; *see also* Binder 41, 9/19/07 Tr. 2518, 2563.) Plaintiffs chose not to test Brown's ongoing-exposure theory by actually testing their clients to determine whether *even a single one*

of them showed current elevated contaminant levels in their bodies. DuPont's evidence about Mrs. Perrine's blood-lead level thus was the only such evidence that existed. But the court prevented the jury from hearing about Mrs. Perrine's test.[15]

First, the court barred DuPont from introducing the testimony of Mrs. Perrine's treating physician, Dr. Haeley Harman. (Binder 42, 9/24/07 Tr. 3074.) Dr. Harman would have explained that her staff gave Mrs. Perrine a blood-lead test in 2005 and that Mrs. Perrine's blood-lead level was normal. (Binder 41, p. 18572, 7/11/07 Harman Dep. Tr. 26-36, attached to Pls.' Mot. to Exclude Harman (9/24/07).)

Second, the court precluded DuPont from asking Mrs. Perrine any questions about her blood-lead test (Binder 42, 9/24/07 Tr. 3074-79)—even though Mrs. Perrine had testified on direct that she was terribly worried about elevated lead levels (*id.* 3097-98).

Next, the court prohibited DuPont from eliciting any testimony about Mrs. Perrine's blood-lead level from DuPont's expert toxicologist, Dr. Rodricks. (Binder 42, 9/25/07 Tr. 3302-03.) Dr. Rodricks would have testified that Mrs. Perrine's blood-lead test showed her blood-lead level to be "very, very much below [a] level of concern." (*Id.* 3290, *see also id.* 3294.) The court precluded Dr. Rodricks's testimony on this issue even though, only the day before, Plaintiffs had *conceded* that such evidence could be admissible through DuPont's expert. (Binder 41, p. 18572, Pls.' Mot. to Exclude Harman at 4 (9/24/07); Binder 42, 9/24/07 Tr. 2974-78.)

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[15] That the Circuit Court permitted DuPont to introduce the results of ATSDR's 1996 blood-lead tests of children in the Spelter area does not justify the exclusion of Mrs. Perrine's clean test. Mrs. Perrine's 2005 test was the only current measurement of any class representative's blood for lead. Had it been aware of this test, the jury would have been hard pressed to find DuPont liable to Mrs. Perrine. And a finding that DuPont was not liable to Mrs. Perrine in turn would have precluded any finding of class-wide liability.

Even when Plaintiffs later opened the door to Mrs. Perrine's blood-lead test, the court closed it. Plaintiffs' expert Dr. Werntz asserted that blood-lead testing in the class area *supported* the theory of ongoing lead exposure in the class area—though Plaintiffs submitted no test results to substantiate his assertion. (Binder 46, 10/2/07 Tr. 4139.) Yet when DuPont sought to refute this assertion with Mrs. Perrine's actual blood-lead measurement, the Circuit Court again excluded the evidence.[16] (Binder 46, 10/3/07 Tr. 4269-71, 4349-50, 4372-73.)

In a case involving claims of health hazards due to lead exposure, the measurement of lead in a plaintiff's body is not just relevant, it is crucial. The Perrine blood-lead test would have fatally undermined Dr. Brown's theory of "ongoing" exposures. According to that theory, Mrs. Perrine's test should have shown "significantly elevated" lead levels, not normal ones. (Binder 42, 9/25/07 Tr. 3294; *see also id.* 3289-90.)

Had Mrs. Perrine been an individual litigant seeking to vindicate only her own claims based on alleged excessive lead exposure, it is inconceivable that this blood-lead test would have been excluded. But here the court excluded the evidence using the class-action form as a justification, ruling that the test results "can't be offered for any extrapolation purposes that can be applied class-wide." (*Id.* 3302-03.) In other words, because the evidence related only to Mrs. Perrine, the Circuit Court deemed it inadmissible. The court's exclusion of evidence central to the claim of a class representative turns the class-action concept on its head.

Mrs. Perrine was the lead class representative in this case, and she testified in that capacity. The fact that she showed no signs of exposure (much less significant exposure) counts

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[16] Plaintiffs say that DuPont, not Dr. Werntz, opened the door. But DuPont asked Dr. Werntz: "You would expect, wouldn't you, if you took blood lead tests of people who lived in the class area, in light of that ongoing exposure that you say is happening, their blood leads would be elevated?" (Binder 46, 10/2/07 Tr. 4139.) Dr. Werntz responded: "Yes, and that was what was found." (*Id.*) Dr. Werntz, not DuPont, opened the door when he went beyond answering the question by providing nonresponsive (and misleading) testimony that blood-lead tests of class members were elevated. (*Id.*)

against any award of class-wide relief. *See Avery v. State Farm Mut. Auto Ins. Co.*, 216 Ill. 2d 100, 139, 835 N.E.2d 801, 827 (2005) ("It is well settled that a class cannot be certified unless the named plaintiffs have a cause of action.") (internal quotation marks and citation omitted). Fundamental to a class action is that the class representative is "typical" of and serves as a proxy for the absent class members, permitting the jury to evaluate the class's claims by evaluating the class representative's claims. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006) (A class action "allows a representative party to prosecute his own claims and the claims of those who present similar issues."); Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 1:1, at 2 (4th ed. 2002) (Class actions are "[r]epresentative suits on behalf of others similarly situated."). A class action does not allow the class representative to avoid being confronted with the weaknesses in her own case by arguing that she is not representative of the class.

The exclusion of Mrs. Perrine's blood-lead test distorted the jury's view of the evidence on the central issue of "exposure." This error perpetuated the misuse of the class-action form and undermined DuPont's ability to defend itself, necessitating reversal.

The Circuit Court erroneously precluded DuPont from introducing the testimony of eight of the ten class representatives. The Circuit Court applied its mistaken concept of a class action to exclude other class-representative evidence crucial to DuPont's defense. At trial, Plaintiffs called only two of the ten class representatives to testify. The Circuit Court permitted Plaintiffs to elicit testimony from each of these two as "a representative of this community." (Binder 42, 9/24/07 Tr. 3126-27.) Plaintiffs elicited testimony from Mrs. Perrine that she worried "constantly" about the alleged contamination (*id.* 3097) and from Ms. Rebecca Morlock

that she was "concerned for myself, my family, everyone I represent . . . . It's scary, you know, it's worrisome" (*id.* 3128, 3134).

Yet when DuPont sought to introduce testimony of the other eight class representatives that none ever sought or received tests for the presence of arsenic, cadmium, or lead in their bodies, and that none ever expressed concerns to a doctor about any alleged exposure (Binder 41, p. 18546, Dep. Tr. excerpts attached to Pls.' Mot. to Strike Dep. Desigs. of Class Reps. (9/24/07)), the court prohibited DuPont from doing so. The court asserted that the testimony of those eight class representatives would "not assist the trier of fact in any way." (Binder 42, 9/25/07 Tr. 3304.) This double standard for the admission of class-representative testimony prevented the jury from hearing evidence that undermined Plaintiffs' claims of ongoing "exposure." The exclusion of this evidence continued the Circuit Court's pattern of allowing Plaintiffs to take advantage of the class-action form, while at the same time impeding DuPont's presentation of critical evidence related to the class representatives.[17]

3. The Circuit Court maintained class treatment at the expense of a fair trial by ignoring individual variations that emerged at trial

The court refused to decertify the property class, even when the "common issue" of "diminished value" disappeared. The Circuit Court maintained the class-action form at the expense of the fair adjudication of individualized issues in other ways. The court had certified the property class based on Plaintiffs' representation that they could prove, on a class-wide basis,

[17] The Circuit Court's handling of the statute-of-limitations issue, *see* pp. 38-39 *supra*, provides another illustration of the lengths to which the court was required to go in order maintain the class-action form. The statute of limitations is highly individualized, "not readily susceptible to a class-wide determination" because it "generally require[s] individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it." *Thorn*, 445 F.3d at 320; *see also Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1988). To maintain the class form, the court devised an expedient, but unfair, solution: On its own motion, it summarily dismissed the defense, ruling that all claims of all class members were timely as a matter of law.

"diminution in value" of each class member's property. (Binder 16, p. 7316, Class Cert. Order at 31-33 (9/14/06).) Plaintiffs represented that this class-wide proof would be presented by a "mass appraisal" performed by their expert, Dr. John Kilpatrick. (*Id.*; *see also* Binder 46, 10/12/07 Tr. 4990-91.) The court certified the property class on this basis, concluding that "mass appraisal" "satisf[ied] the commonality requirement." (Binder 16, p. 7316, Class Cert. Order at 33 (9/14/06).)

But during trial, this premise of the property-class certification disappeared. Plaintiffs withdrew Dr. Kilpatrick and abandoned their diminution-in-value theory. Yet the Circuit Court refused to decertify the property class. The court permitted Plaintiffs to replace the class claim for diminution—a necessary basis for certifying the property class—with a class claim for remediation costs. (Binder 46, 10/12/07 Tr. 4988-94.) It did so even though there is no plausible argument, and the court made no determination, that such costs can be fairly considered common issues. Remediation costs necessarily vary from property-to-property, depending on such factors as contaminant levels, property structures and structure ages, the housekeeping and maintenance practices of the residents, and property size.

The court refused to decertify the medical-monitoring class, even when the "common issue" of "significant exposure" disappeared. The Circuit Court also certified the medical-monitoring class based on Plaintiffs' representation that they could prove, on a class-wide basis, "significant exposure" of each class member. (Binder 16, p. 7316, Class Cert. Order at 30-31 (9/14/06).) But during trial, the premise of the medical-monitoring class certification disappeared. Plaintiffs' own contaminant measurements showed that arsenic, cadmium, and lead are not present throughout the class area at levels that increase the risk of disease. *See* pp. 10-11 *supra*. That should have been the death knell for their class action.

4. This Court should reverse the Circuit Court and remand for individual trials of individual issues

Class-wide adjudication cannot come at the expense of fundamental fairness. Yet that is what happened here. The Circuit Court relieved Plaintiffs of their obligation to prove all elements of their individual claims and subverted DuPont's ability to advance individual defenses to those claims.

In so doing, the court disregarded the axiom that class actions are "not meant to alter the parties' burdens of proof . . . or the substantive prerequisites to recovery under a given tort." *Sw. Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000). And the court allowed the class to aggregate a set of disparate claims to create "a composite case . . . much stronger than any plaintiff's individual action would be." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1988). The result was a violation of DuPont's right to due process. *See Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) ("[D]ue process requires that class actions not be used to diminish the substantive rights of any party to the litigation."); *Thorn*, 445 F.3d at 318 (improperly certified class actions undermine "the right of the defendant to present facts or raise defenses that are particular to individual class members").

For these reasons, this Court should remand this case for individual trials of individual issues. Even if there are particular issues that this Court believes were properly tried on a class-wide basis, due process requires individual trials on those issues that are insufficiently common and as to which a class action is unmanageable. The Circuit Court admitted that "some issues may require individual resolution" (Binder 16, p. 7316, Class Cert. Order at 3 (9/14/06)) and that precedent supports "reserving any 'unmanageable' issues for litigation at a later time" (*id.* 18).

Under these circumstances, an issues class, followed by separate trials, would be required. *See* W. Va. R. Civ. P. 23(c)(4).

III. The Circuit Court's Errors Resulted in Verdicts Against DuPont Even Though the Evidence Shows that the Spelter Community Is Not at Increased Risk

A. The Property Class Recovered the Cost of Property Remediation Without Proof of Harm to Property

The jury awarded property-remediation damages without any finding of material harm to properties. Over DuPont's objections, the court adopted Plaintiffs' verdict form, which required the jury to find only that DuPont contributed to "exposure" of Plaintiffs or their properties to arsenic, cadmium, or lead. But the court never defined "exposure" for the jury. Nor did the court define how much "exposure" was required to find DuPont liable. Instead, the court permitted the jury to find DuPont liable if *any* amount of arsenic, cadmium, or lead migrated from the smelter site to Plaintiffs or their property. The result: a $55 million class-wide remediation damages award even though the vast majority of Plaintiffs' own contaminant measurements show levels below West Virginia screening levels.

1. The verdict form and jury instructions impermissibly allowed liability without requiring harm to property

The Circuit Court adopted the Phase I verdict form, and its undefined use of "exposure," over DuPont's objections. (*See* Binder 42, p. 19330, DuPont's Objs. to Verdict Form ¶ 3 (9/28/07).) The court rejected DuPont's proposed verdict form, which would have required the jury to find that arsenic, cadmium, or lead created an "unreasonable risk of harm" to the Plaintiffs or their property. (*Id.* ¶ 3, Ex. B.) The Court also refused a jury instruction that would have explained that only "material[ly]" increased levels of those elements create an unreasonable risk of harm. (*See* Binder 42, p. 19349, DuPont's Objs. to Instr., No. 15A (9/28/07).)

The court's refusal to define "exposure," along with its failure to require proof that the levels of contaminants in the class area are hazardous, lowered the bar for the property class, ensuring a verdict for Plaintiffs on the property class's claims. The jury was permitted to find against DuPont if even trivial amounts of arsenic, cadmium, or lead had migrated to Plaintiffs' properties. Plaintiffs made this very point to the jury, stating that the trespass claim against DuPont was an "easy one" because it required proof only that "contamination [left] the smelter site and [got] into the class area," without regard to the levels of arsenic, cadmium, and lead found on any plaintiff's property. (Binder 42, 9/28/07 Tr. 3773.)

The property remediation verdict form asked the jury whether the property class was "entitled" to remediation and, if so, what the costs of that remediation would be. But the court provided the jury no guidance on what would create an "entitlement" to remediation. Plaintiffs were never required to prove that the levels of arsenic, cadmium, or lead in the property class were hazardous or that the properties in question had been injured. The Phase I "exposure" verdict was the only basis for awarding property damages against DuPont.

Nor did the court instruct the jury on causation. This allowed the property class to recover without any finding that, in the words of DuPont's rejected instruction, "the emissions of arsenic, cadmium or lead from the former smelter site caused harm to Plaintiffs' properties." (Binder 45, p. 20710, DuPont's Objs. to Phase III Jury Instr., No. 1A (10/12/07).) The property class thus obtained over $55 million in damages based on a mere showing that the smelter "exposed" their properties to unspecified levels of arsenic, cadmium, or lead.

Plaintiffs argue that the Phase I jury instruction defining the standard of care for negligence was a sufficient substitute for instructions defining "exposure" and requiring causation. But Plaintiffs' trespass and nuisance claims required no showing of negligence, so the

standard of care definition did not affect these claims. Even for the negligence claim, the standard of care instruction does not address whether alleged exposures harmed Plaintiffs' property in any material way.

2. The Circuit Court's approach expands West Virginia law by permitting Plaintiffs to recover "remediation costs" for unjustified cleanups

By allowing Plaintiffs to collect a massive remediation judgment without proving more than that their properties were exposed to unspecified levels of arsenic, cadmium, and lead, the Circuit Court expanded West Virginia law in a manner that other courts have consistently rejected.

In similar cases involving emissions of pollutants, other state courts have insisted on more than mere exposure to allow recovery. The Washington Supreme Court, for example, has held that trespass and nuisance claims involving the airborne migration of arsenic, cadmium, and other metals produced by a smelter require a showing "that a plaintiff has suffered actual and substantial damages." *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash. 2d 677, 691-92, 709 P.2d 782, 790-91 (1985). "Under the Washington Supreme Court's decision . . . one of the necessary elements of a trespass claim based on emission of imperceptible airborne pollutants is substantial damages to the *res* upon which the trespass occurs." *Bradley v. Am. Smelting & Ref. Co.*, 635 F. Supp. 1154, 1156 (W.D. Wash. 1986). Other states have adopted similar rules.[18]

The same approach is appropriate under West Virginia law. *Cf. Browning v. Halle*, 219 W. Va. 89, 94, 632 S.E.2d 29, 34 (2005) (rejecting nuisance and negligence claims based on

[18] *See, e.g., Smith v. Carbide & Chems. Corp.*, 226 S.W.3d 52, 55-56 (Ky. 2007) (To recover more than nominal damages on a trespass claim, a landowner must provide "proof of actual injury to the real estate," *i.e.*, "an interference with an owner's use of the land."); *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 390 (Colo. 2001) (requiring proof of "physical damage to the property caused by [the] intangible intrusion"); *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529-30 (Ala. 1979) (plaintiffs making trespass claims based on airborne pollution must show "substantial actual damage to the Res").

alleged water pollution where plaintiffs failed to produce evidence that defendant had "materially diminished the quality of [the stream] for reasonable uses"). At least in cases involving airborne contamination, trespass claims require more than just entry and *de minimis* harm; instead, there must be an actual injury or a material risk of injury. This understanding of the common law allows landowners to recover if they have suffered genuine harm, without threatening industrial operations by allowing every incidental offsite exposure of a potentially hazardous substance to become the predicate for legal damages. "No useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant." *Bradley*, 104 Wash. 2d at 692, 709 P.2d at 791.

Any other conclusion would allow landowners throughout the State to obtain windfall recoveries that bear no relationship to the magnitude of any actual harm inflicted by technical trespasses or modest exposures. Because "after a century and a half of industrialization there is most likely no land in the continental United States that is completely free from one or more potentially toxic or harmful substances," such a result threatens any industrial operation, no matter how careful or responsible, with potentially ruinous liability. *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 621 (Ky. App. 2004).

B. The Circuit Court Adopted an Unjustified Medical-Monitoring Program

The court adopted a 40-year medical-monitoring program without evidence of significant exposure and increased health risk. Plaintiffs' own environmental contaminant measurements and the ATSDR blood-lead measurements contradict Plaintiffs' claims that the class has been "significantly exposed," that it faces "increased risk," and that there is a "reasonable necessity" to undergo medical monitoring. The flawed, inadmissible health-risk assessment of Dr. Brown, the soil scientist, fails to support class-wide medical monitoring. Uncontradicted evidence

showed that (1) under his risk assessment the "increased risk" sufficient for admission into the medical-monitoring program is *de minimis*, and (2) the monitoring program presents more health risks to the class than the plant allegedly did.

1. The medical-monitoring class did not show "significant exposure" or "increased risk" under *Bower*

This Court should reverse the medical-monitoring judgment because it awards monitoring based on toxic "exposure" so minimal that it cannot meet the requirements of *Bower v. Westinghouse Electric Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999).

In *Bower*, this Court held that "to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that

> (1) he or she has been *significantly exposed*; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered *an increased risk of contracting a serious latent disease relative to the general population*; (5) the increased risk of disease makes it *reasonably necessary* for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that would make the early detection of a disease possible.

Syl. Pt. 3, 206 W. Va. 133, 522 S.E.2d 424 (emphasis added). As the Circuit Court recognized, Plaintiffs must prove these elements of a medical-monitoring claim for all class members. (Binder 46, 10/9/07 Tr. 4654-55.) This Court has indicated that "*Bower* establishes an extremely high bar for a plaintiff to overcome before there can be any recovery for medical monitoring." *In re Tobacco Litig.*, 215 W. Va. 476, 482, 600 S.E.2d 188, 194 (2004).

Plaintiffs' evidence did not come close to clearing *Bower*'s "high bar." Plaintiffs' own contaminant measurements undermined their claim of "significant exposure" to hazardous substances. The actual measurements showed that arsenic, cadmium, and lead are not present throughout the class area at levels that increase the risk of disease. *See* pp. 10-11 *supra*. These

measurements show that much of the class area could be called "contaminated" only in the sense that contaminant levels are higher than levels found in undisturbed, natural settings. That definition of "contamination" would apply to virtually any developed area. It does not show that the class members have been "significantly exposed," that they face "increased risk," or that there is a "reasonable necessity" to undergo medical monitoring on a class-wide basis.

Plaintiffs' environmental data are consistent with the ATSDR's blood-lead measurements of children in the Spelter community. *See* p. 8 *supra*. Based on those tests, ATSDR concluded that "it does not appear that children in Spelter are being exposed to hazardous levels of lead." (DX 648 at 3.) ATSDR also determined that "further community-wide screening for lead poisoning in Spelter is not indicated at this time." (*Id.*)

Despite the actual data that fail to suggest significant exposure, Plaintiffs' medical-monitoring expert, Dr. Werntz, admitted that he simply *assumed* significant class-wide exposure to arsenic, cadmium, and lead. (Binder 46, 10/2/07 Tr. 4143, 4149-51.) Dr. Werntz's testimony about the need for medical monitoring was based entirely on the exposure and risk assessment of Dr. Brown (*id.* 4038, 4143), the soil scientist with no medical expertise, *see* p. 29 *supra*.

Even accepting Dr. Brown's risk assessment model, it fails to show significantly increased risk. Uncontradicted evidence established that the "increased risk" he deemed sufficient for admission into Plaintiffs' medical-monitoring program was equal to the risk from smoking a single pack of cigarettes over an entire lifetime (that is, one cigarette about every three or four years). (Binder 46, 10/4/07 Tr. 4511-15.) As a matter of law, such an infinitesimally small risk cannot qualify as "significant" so as to justify medical monitoring under *Bower*.

2. The Circuit Court erroneously included CT scans in the medical-monitoring plan

DuPont submitted overwhelming, unrebutted evidence that Plaintiffs' program of biennial CT scans will present far more cancer risk to the class members than they allegedly experience as a result of any exposure to arsenic, cadmium, and lead from the smelter.

CT scans expose patients to "invasive" doses of "ionizing radiation, which can potentially cause you cancer." (Binder 46, 10/3/07 Tr. 4427-28, 4423; *see also* Binder 46, 10/2/07 Tr. 4165-66; Binder 46, 10/4/07 Tr. 4533-35.) That is why public health agencies and leading scientists agree that the risks of harm from using CT scans for medical screening outweigh any monitoring benefit. For example, the United States Preventive Services Task Force ("USPSTF"), the preeminent preventive health body in the country (Binder 46, 10/2/07 Tr. 4153), does not recommend CT scans or other screening for lung cancer for anyone. As the USPSTF guidelines provide:

> The benefit of screening for lung cancer has not been established in any group, including asymptomatic high-risk populations such as older smokers. . . . Because of the invasive nature of diagnostic testing and the possibility of a high number of false-positive tests in certain populations, there is potential for significant harms from screening.

(*Id.* 4156-58.) Similarly, an article in the *Journal of the American Medical Association*—an article upon which Dr. Werntz claimed to rely—concluded that CT screening for lung cancer is "an experimental procedure, based on an uncorroborated premise." (*Id.* 4164.)

The risks of CT scans that the USPSTF identified were discussed at length in a *New England Journal of Medicine* article published after the trial, but before the post-trial medical monitoring hearing. (Binder 53, DuPont 1/15/08 Hr'g Ex. 1.) This study concluded that "there is direct evidence from epidemiologic studies" that radiation doses corresponding to "*two or*

three scans" result in "an increased risk of cancer." (*Id.* at 4.) Under the plan approved by the Circuit Court, class members would receive chest CT scans "every two years . . . for 40 years." (Binder 46, 10/2/07 Tr. 4166-67.) "[A]bout 40 percent" of class members would receive even more scans because of "false positives," which Dr. Werntz admitted are "very common." (*Id.*)

Dr. Werntz acknowledged that he never estimated the radiation doses that would result from the CT scans in his proposed plan. (*Id.* 4165-67.) Nor did he ever quantify the number of cancers among the class members that this radiation dose would cause. Dr. Peter Valberg, a toxicology and public health expert who taught at the Harvard School of Public Health for 23 years, did do those calculations. He estimated that Dr. Werntz's program of CT scans would cause *an additional 70 expected cancers among class members*, far more than the number of cancers that the smelter allegedly could have caused. (Binder 46, 10/4/07 Tr. 4550-53.) Dr. Valberg calculated that, even accepting Dr. Brown's risk assessment, no more than two to three additional cancers would hypothetically be caused among all class members as a result of the smelter. (*Id.* 4623-24; *see also* Binder 52, p. 23760, Valberg Report at 2, 31-33, 40, Ex. G to DuPont's Resp. to Med. Mon. Plan (12/10/07).)

Plaintiffs did not dispute this evidence. Instead, their counsel told the jury not to worry about the CT scan risks because the court would carefully evaluate CT scans after trial and exclude them from the medical-monitoring program if they were "not appropriate." (Binder 46, 10/9/07 Tr. 4714.) During jury deliberations, when the jury asked whether it could exclude a particular test from the medical-monitoring program, the court told the jury that "[w]hether an individual test is made available to the medical monitoring class will be subject to the Court's oversight of the medical monitoring program." (Jury Ex. 2.)

But the Circuit Court failed to exercise this promised oversight responsibility. It simply adopted Plaintiffs' proposed plan wholesale—including a 40-year plan of biennial CT scans for thousands of class members. The CT scans inflated the estimated cost of the medical-monitoring program by $50 million (and thereby inflated Plaintiffs' counsels' fee request).

The court should have excluded CT scans from the medical-monitoring program because they present more risk of harm than benefit. The court's contrary ruling ignores *Bower*'s requirement that tests be ones "that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent." 206 W. Va. at 142, 522 S.E.2d at 433. The undisputed evidence concerning the harm from CT scans requires that this Court overturn the portion of the Circuit Court's February 25, 2008, medical-monitoring order requiring a 40-year class-wide program of dangerous, biennial CT scans.

3. The Circuit Court erroneously adopted Plaintiffs' 40-year program duration

The Circuit Court committed an independent error after trial by adopting wholesale the Plaintiffs' proposed 40-year medical-monitoring plan. Even if medical monitoring were justified, a 40-year period would be far too long.

A proper medical-monitoring program would administer tests only for the latency period (the time between chemical exposure and disease onset) of the disease that the test is designed to detect. Continuing testing beyond the latency period provides no benefit and subjects individuals to unnecessary risks. (Binder 46, 10/3/07 Tr. 4406-08.)

Plaintiffs justified a 40-year program based entirely on a single study of Japanese men completed in 1976. (Binder 54, p. 24676, 4/12/07 Werntz Dep. Tr. 302-03, Ex. F to DuPont's

Sub. on Med. Mon. (2/1/08).)[19] But that study concerned only lung cancer; it did not address the latency period of any other medical condition. It cannot support a 40-year term for the medical-monitoring program. In reaching the contrary conclusion, the Circuit Court disregarded the absence of any evidence that the latency periods for the other diseases included in the medical-monitoring program even approach 40 years. The court also ignored Dr. Werntz's own admission that other diseases have much shorter latency periods. (*See, e.g., id.* 188.)[20]

C. The Punitive Damages Award Should Be Vacated

DuPont's conduct—operating a smelter more than 50 years ago in accordance with standards prevailing at the time, and later cleaning up the site in cooperation with state and federal regulatory authorities—does not justify an award of punitive damages. The jury's $196.2 million punitive award is the product of the Circuit Court's evidentiary and instructional errors and its repeated refusal to curb the inflammatory rhetoric of Plaintiffs' counsel in every phase of the trial. Apart from these errors, the punitive award is grossly and unconstitutionally excessive.

1. DuPont's conduct does not support punitive liability

Plaintiffs based their argument for punitive liability on (a) DuPont's 1928-1950 conduct in connection with operating the smelter, and (b) DuPont's conduct in connection with its remediation effort more than 40 years later. If either of these bases for punitive liability were improper, then the punitive award is invalid and a new trial on punitive damages is required. *See*

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[19] The submission is dated February 1, 2008, but appears on the Circuit Court's index on February 4, 2008.

[20] DuPont believes the 40-year duration, and various other unsupportable assumptions, render the Circuit Court's $130 million cost estimate grossly inflated. Because only the actual costs of the program, and not estimated costs, are to be borne by DuPont, the only current effect of those overestimates is to inflate the size of the $135 million award of attorneys' fees and expenses, which is to be paid by the class. (Binder 54, p. 24935, Order Regarding Fees (2/25/08).) Should this issue ripen by an effort to shift fees or expenses to DuPont or to require DuPont to post security for medical monitoring in an excessive amount, DuPont reserves the right to challenge the Circuit Court's inflated estimate at that time.

Rodgers v. Rodgers, 184 W. Va. 82, 96, 399 S.E.2d 664, 678 (1990); *see also Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2615 n.3 (2008).

Punitive damages may be assessed only upon a finding that the defendant engaged in "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 648, 609 S.E.2d 895, 909 (2004) (internal quotation marks omitted). Neither DuPont's conduct in connection with operating the smelter nor DuPont's conduct in connection with its voluntary remediation shows the exceptional degree of wrongdoing needed to support punitive liability.

a. DuPont's 1928-1950 conduct does not justify punitive damages

DuPont's operation of the smelter from 1928 to 1950 was both lawful and in accord with industry standards of the time. To the extent that the jury may have punished DuPont by retroactively applying today's standards of conduct, the punitive award is unconstitutional. *See E. Enters. v. Apfel*, 524 U.S. 498 (1998); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281 (1994) ("Retroactive imposition of punitive damages would raise a serious constitutional question."). Furthermore, the prospect of punishment long after the responsible employees are retired or deceased serves no deterrent purpose.

Even under today's standards, DuPont's operation of the smelter was not wanton, willful, or reckless conduct that could support an award of punitive damages under West Virginia law. Upon taking over the facility in 1928, DuPont upgraded its operations, replacing the horizontal retort furnaces with vertical retorts that significantly reduced the facility's environmental impact. (Binder 40, 9/13/07 Tr. 1165; Binder 42, 9/24/07 Tr. 2923-26.)

Plaintiffs' attack on DuPont's pre-1950 conduct rested entirely on the speculative testimony of Steven Amter, a hydrogeologist (with an "interest" in industrial history), that a "bag

house" might have better controlled air emissions. (Binder 41, 9/20/07 Tr. 2762-63.) But Amter admitted that he was unaware of any vertical retort zinc smelter that used a bag house before 1950. (Binder 42, 9/24/07 Tr. 2926-27.) And Plaintiffs presented no evidence that DuPont believed that the absence of a bag house would expose surrounding properties to dangerous emissions and consciously disregarded that risk.

A company that acts to reduce emissions and resolve complaints cannot be considered "willful, wanton, or reckless"—especially absent proof of knowledge that those measures were ineffective and that superior measures were reasonably available. *See Stone v. Rudolph*, 127 W. Va. 335, 345-47, 32 S.E.2d 742, 748-49 (1944). That standard requires that the defendant "consciously and intentionally did some wrongful act or omitted some known duty." *Groves v. Groves*, 152 W. Va. 1, 7, 158 S.E.2d 710, 713 (1968). Compliance with prevailing industry standards serves to "negate conscious disregard and to show that the defendant acted with a nonculpable state of mind." *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *see also Strum v. Exxon Co., U.S.A.*, 15 F.3d 327, 332 (4th Cir. 1994) (rejecting claim of wanton and reckless conduct where plaintiff presented no evidence of "normal industry standards").

DuPont's record of not only complying with contemporary standards, but also licensing new technology to reduce emissions shortly after it bought the plant negates the unfounded assertion that it intentionally polluted Spelter. And DuPont cannot have "known" of a legal "duty" to adopt measures that no zinc smelter in the world employed.

In denying DuPont's post-trial motions, the Circuit Court focused almost exclusively on evidence that some contamination had occurred. It failed to consider the complete lack of evidence that DuPont should or even could have prevented that contamination. The court ignored testimony from Plaintiffs' expert that the switch to vertical retorts made the facility a

"cleaner operation." (Binder 40, 9/13/07 Tr. 1165.) The court asserted that "DuPont made no effort to implement any air pollution controls," but it did not explain how that behavior could have been willful, wanton, or reckless in view of the undisputed evidence that DuPont met industry standards. (Binder 54, p. 24972, Order Den. Mot. to Vacate at 22 (2/25/08).)

Punitive damages require an exceptional degree of wrongdoing, beyond that required for compensatory liability. DuPont's 1928-50 plant operations cannot support any such showing.

b. DuPont's remediation efforts cannot support punitive damages

There is no dispute that DuPont complied with all applicable regulations and government orders in remediating the site. Plaintiffs nevertheless argued (and the Circuit Court held) that punitive damages were justified because DuPont did not go beyond the site's boundaries to test and remediate class members' properties. Punishment on that basis cannot be squared with the undisputed fact that DEP and EPA—the environmental regulators who, under West Virginia and federal law, were responsible for the cleanup—*did* test neighboring properties and children from the Spelter community and concluded that off-site remediation was not necessary. (Binder 41, 9/18/07 Tr. 2205-08; Binder 50, 10/17/07 Tr. 5471-72.) Even if the regulators' conclusions were incorrect, DuPont's reliance on those conclusions cannot be considered willful, wanton, or reckless.

The Due Process Clause of the Fourteenth Amendment forbids punishing a defendant for "do[ing] what the law plainly allows him to do." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (quoted in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996)). Here, the law, as embodied in the approved cleanup plan, "plainly allow[ed]" DuPont to confine its remediation to the smelter site, rendering punishment predicated on the scope of that cleanup unconstitutional and invalid under West Virginia law. *See Warden v. Bank of Mingo*, 176 W. Va. 60, 65, 341

S.E.2d 679, 684 (1985) ("A wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for punitive damages."). In addition, regulatory compliance, particularly in a highly regulated field such as environmental remediation, negates the mental state required to impose punitive damages.[21]

Plaintiffs assert that DuPont company policy was to "keep the public in the dark" about the alleged health risks associated with its operations in order to minimize cleanup and litigation costs. (*See* Pls.' Resp. to DuPont's Consol. Pet. at 51-54 (7/24/08).) First, this allegation cannot support a punitive award because there was no claim for, and therefore no jury instruction or finding on, fraud or misrepresentation. The "willful, wanton, or reckless" conduct supporting a punitive award must be the same conduct for which the defendant is found liable. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003) ("A defendant's dissimilar acts, *independent from the acts upon which liability was premised*, may not serve as the basis for punitive damages. A defendant should be punished for *the conduct that harmed the plaintiff*, not for being an unsavory individual or business.") (emphasis added).

Second, the record, including the "Connect the Dots" presentation upon which Plaintiffs so heavily rely, does not support Plaintiffs' argument. This presentation does not show that DuPont concealed anything at Spelter. The DuPont project manager at Spelter had never even seen the Connect the Dots document before trial. (Binder 41, 9/19/07 Tr. 2441, 2449.)

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[21] *See, e.g., Bonnette v. Conoco, Inc.*, 837 So. 2d 1219, 1238 (La. 2003) ("Because [defendant] acted in compliance with regulations in effect during the events at issue, we cannot say that defendant's conduct was highly unreasonable or that it involved an extreme departure [from] ordinary care."); *Stone Man, Inc. v. Green*, 263 Ga. 470, 472, 435 S.E.2d 205, 206 (1993) ("[C]ompliance with county, state, and federal regulations is not the type of behavior which supports an award of punitive damages; indeed, punitive damages, the purpose of which is to 'punish, penalize or deter,' are, as a general rule, improper where a defendant has adhered to environmental and safety regulations."); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (punitive damages found inappropriate where defendant showed "compliance with both federal regulations and industry practices").

Third, DuPont introduced undisputed evidence that it took affirmative steps to inform the public about contaminants at the site, actions that are irreconcilable with a policy of concealment. For instance, DuPont published a notice in the local newspaper stating that "sampling results indicate the potential contaminants of concern for the site are antimony, *arsenic*, *cadmium*, copper, *lead*, manganese, silver, selenium, and zinc." (Binder 41, 9/18/07 Tr. 2279 (emphasis added); DX 5040.) DuPont also distributed a community newsletter describing the residue pile: "The material is up to 80 to 115 feet thick in some places and has significantly elevated levels of heavy metals, including arsenic, lead, cadmium and zinc." (Binder 41, 9/18/07 Tr. 2285; DX 783; *see also*, *e.g.*, Binder 41, 9/18/07 Tr. 2234-37 (DuPont established community advisory board in 1998); Binder 41, 9/19/07 Tr. 2310-11 (DuPont held community meetings to answer questions and provide progress reports on remediation); Binder 41, 9/18/07 Tr. 2280-83; Binder 41, 9/19/07 Tr. 2305-07 (DuPont maintained public repository of remediation-related documents).) This uncontroverted evidence of specific disclosures in Spelter negates any inference that DuPont had an overarching corporate policy of concealment. *See Adams v. Sparacio*, 156 W. Va. 678, 685, 196 S.E.2d 647, 653 (1973) (directed verdict required where evidence "founded on speculation and conjecture" is contradicted by "positive testimony").

c. Imposing punitive damages for failing to go beyond the requirements of a state-approved, voluntary remediation plan is against public policy

In *Garnes v. Fleming Landfill Inc.*, this Court warned that "[u]nchecked punitive damages awards" may have "effects that are detrimental to society as a whole." 186 W. Va. 656, 661, 413 S.E.2d 897, 902 (1992); *see also Blankenship v. Gen. Motors Corp.*, 185 W. Va. 350, 352 n.4, 406 S.E.2d 781, 783 n.4 (1991) (Excessive awards have a "chilling effect on research,

innovation and competition."). The Court concluded that "[w]e want people to take all of those precautions for which the benefits outweigh the costs, but only those precautions." *Garnes*, 186 W. Va. at 662, 413 S.E.2d at 903.

Despite DuPont's remediation of the site, the Circuit Court not only ordered DuPont to pay for off-site remediation and for medical monitoring, but also allowed a $196.2 million punishment. Punishing conduct that complied not only with generally applicable regulations, but also with a state-sanctioned plan tailored to the site would have precisely the "chilling effect" on socially beneficial conduct that this Court warned of in *Garnes*. Engaging in a voluntary, approved, and successful remediation should be encouraged, not punished.

2. The Circuit Court violated the Due Process Clause by refusing to instruct the jury that it could not punish DuPont based on evidence of dissimilar conduct

The Circuit Court also committed reversible error by permitting the jury to base punitive damages on alleged conduct at other plants having nothing to do with Spelter. The court refused to instruct the jury that it could not base punitive damages on conduct that was dissimilar to the conduct that injured Plaintiffs. A new trial is the only adequate remedy.[22]

The court's instruction that DuPont should not be punished for harm to non-parties cannot justify its refusal to give a "dissimilar conduct" instruction. (*See* Binder 54, p. 24953, Order Den. Mot. for New Trial at 16 (2/25/08).) First, the prohibition against punishment for harm to non-parties is different from the prohibition against punishment for dissimilar conduct. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064-65 (2007). Giving one instruction cannot excuse failing to give the other.

[22] DuPont's proposed instruction specified: "'A defendant's dissimilar acts, independent from the acts upon which' you based your previous findings of liability, 'may not serve as the basis for punitive damages.'" (Binder 50, p. 23140, DuPont's Obj. to Phase IV Instr., No. 5 (10/18/07) (citing *Boyd v. Goffoli*, 216 W. Va. 552, 560, 608 S.E.2d 169, 177 (2004) (quoting *State Farm*, 538 U.S. at 422)).)

Second, the court's "harm to non-parties" instruction told the jury that it *could* consider harm to non-parties in determining the reprehensibility of conduct that harmed Plaintiffs. (Binder 50, 10/18/07 Tr. 5677-78.) But *Williams* allowed consideration only of similar acts. Dissimilar conduct may not be considered for any purpose, either as a basis for punishment or in determining the degree of reprehensibility of conduct that harmed a plaintiff. *See State Farm*, 538 U.S. at 422 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages."); *id.* at 424 ("The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance.").

Plaintiffs' primary evidence of dissimilar conduct related to DuPont's plant in Parkersburg. *See* Part I.A *supra*. The Parkersburg plant was the subject of highly publicized class-action litigation that settled in 2005 and that involved C8, a compound never made or used at Spelter. As discussed above, *see* pp. 24-25 *supra*, Plaintiffs' counsel's incendiary arguments about DuPont's operation of the Parkersburg plant dominated Plaintiffs' phase IV presentation. Among many other things, Plaintiffs charged that DuPont caused "birth defects" in the unborn child of an unidentified Parkersburg employee. (Binder 50, 10/16/07 Tr. 5203; Binder 50, 10/18/07 Tr. 5780.)

The court should never have permitted these inflammatory, irrelevant allegations and arguments. Once the court allowed Parkersburg into the case, the court was required to inform the jury about the limitations on the use of this evidence. The court's failure to do so violated federal due process and necessitates a new trial. *See* Syl. Pt. 1, *Slater v. United Fuel Gas Co.*, 126 W. Va. 127, 27 S.E.2d 436 (1943); *Garrett v. Desa Indus., Inc.*, 705 F.2d 721 (4th Cir. 1983).

3. The Circuit Court abused its discretion by allowing Plaintiffs' counsel to urge the jury to "send a message" to large, out-of-state corporations

Plaintiffs' counsel repeatedly invoked the environmental impact of industry on the State as a whole and urged the jury to use its verdict to send a message to large corporations. Counsel told the jurors that they were "the first jury that's gonna have to make a decision about West Virginia" (Binder 50, 10/18/07 Tr. 5783-84), and urged them to award punitive damages against DuPont for the purpose of ending all pollution in West Virginia. Counsel suggested that imposing a large award on DuPont would help to end the practice of mountaintop mining—a reference designed to evoke strong emotion from the jurors but one that bore no relation to this case (or to DuPont):

> [W]hen you tell [DuPont] that with a number, *you won't have people blowing tops off of mountains*, and you won't have people polluting your rivers, and you won't have these *carpetbaggers* coming into this town . . . and *raping the natural resources* of this area. . . . This is the first time this is gonna be tested in this state, with a full-blown community environmental process, right here.

(*Id.* at 5783 (emphasis added); *see also* Binder 50, 10/16/07 Tr. 5243 ("[Y]ou're not here just for this area; you're here for the entire State of West Virginia."), 5205-06, 5217-18, 5220, 5230, 5232, 5240.)

Plaintiffs' counsel also urged the jury to punish DuPont because it chose to defend itself in court:

> [W]hat does it take for this corporation to get it? They didn't get it the first time when you came out with the first part of the verdict, they didn't get it. They didn't get it the second time you came out with the second part of your verdict, they didn't get it. They didn't get it yesterday when you came back with your verdict, they didn't get it. And they don't get it today. . . . And you've got to ask yourself, what does it take to protect this community, what does it take to protect people in West Virginia from a renegade corporation that doesn't get it?

(Binder 50, 10/16/07 Tr. 5205.) At the end of the argument, defense counsel immediately moved for a mistrial, which the Circuit Court denied. (*Id.* 5262-63, 5267-69.)

This inflammatory, baseless rhetoric deprived DuPont of a fair trial. Plaintiffs' counsel made raw appeals to the jurors to "use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). This Court has recognized that "local juries and local courts naturally will favor local plaintiffs over out-of-state (often faceless, publicly held) corporations when awarding punitive damages" in order to "redistribute wealth from without the state to within." *Garnes*, 186 W. Va. at 665, 413 S.E.2d at 906; *see also State Farm*, 538 U.S. at 417-18 (same); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality op.) (expressing concern about "prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident").

This Court has also held that:

> [T]he only remedy for such misconduct is a new trial. While great latitude is allowed argument of counsel, they should not be permitted to excite and inflame the minds of the jury against one of the litigants, nor appeal to their passions and prejudices, and if, when such an argument is made and the trial court is appealed to, it fails to take proper steps to correct its ill tendencies, and an exception is taken at the proper time, it is good ground for reversing the judgment and setting aside the verdict.

Crum v. Ward, 146 W. Va. 421, 434, 122 S.E.2d 18, 26 (1961) (internal quotation marks omitted); *see also Hendricks v. Monongahela W. Penn Pub. Serv. Co.*, 111 W. Va. 576, 586-87, 163 S.E. 411, 415-16 (1932) (reversing jury verdict based on improper appeal to jury's sympathy in closing arguments and observing that, despite an immediate curative instruction, "the persistence in the appeal could not fail in making its impression on the minds of the jurors").

A new trial is the only adequate remedy here.

4. The punitive award is excessive as a matter of state law and federal due process

In addition to punishing constitutionally protected activity, the jury's $196.2 million punitive damages award is grossly excessive under West Virginia law and the federal Due Process Clause. Because the lower court's excessiveness analysis is a determination of law, not of fact, this Court's review is *de novo*. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001); *Boyd v. Goffoli*, 216 W. Va. 552, 559, 608 S.E.2d 169, 176 (2004). Close review is particularly necessary when, as in this case, Plaintiffs' counsel have sought to invoke the jury's bias against large, out-of-state corporations. *Garnes*, 186 W. Va. at 665, 413 S.E.2d at 906; *id.* at 664, 413 S.E.2d at 905 ("fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants"). A close review shows that the punitive award must be vacated.

The U.S. Supreme Court has identified three factors to determine whether an award of punitive damages exceeds constitutional limits: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418. This Court likewise has identified factors for juries and reviewing courts to consider. *See* Syl. Pts. 3 & 4, *Garnes*, 186 W. Va. 656, 413 S.E.2d 897.[23] The central inquiry

[23] These factors, discussed below, are: (1) "the harm that is likely to occur from the defendant's conduct as well as . . . the harm that actually has occurred"; (2) "the reprehensibility of the defendant's conduct"; (3) any profits to the defendant from its wrongful conduct; (4) the amount of compensatory damages; (5) "[t]he financial position of the defendant"; (6) "[t]he costs of the litigation"; (7) "[a]ny criminal sanctions imposed on the defendant for [its] conduct"; (8) "other civil actions against the same defendant, based on the same conduct"; and (9) "[t]he appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed." Syl. Pts. 3 & 4, *Garnes*, 186 W. Va. 656, 413 S.E. 2d 897.

of both tests is the same: A punitive award is excessive if "a lesser deterrent would have adequately protected the interests of [West Virginia residents]." *BMW*, 517 U.S. at 584-85. *See also State Farm*, 538 U.S. at 417; *Garnes*, 186 W. Va. at 661, 413 S.E. 2d at 902.

The Circuit Court did not conduct a "meaningful and adequate review," *Garnes*, 186 W. Va. at 667, 413 S.E.2d at 909—or any review at all—of that question. Instead of assessing whether $196.2 million is the minimum necessary to deter the conduct at issue in this case, the court rubber-stamped the huge award after finding that the ratio of punitive to compensatory damages was somewhere between 1:1 and 3.5:1. (*See* Binder 54, p. 24972, Order Den. Mot. to Vacate at 28-29 (2/25/08).) The decision below reflects the common misperception that state law and the Constitution permit any award that is less than nine times the compensatory damages, even when the compensatory damages (and other costs that the defendant incurs) fully satisfy the State's legitimate interests in punishment and deterrence. *See, e.g.*, *State Farm*, 538 U.S. at 419 ("punitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence") (emphasis added); *Garnes*, 186 W. Va. at 667 n.7, 413 S.E.2d at 908 n.7 ("Punitive damages should provide the appropriate disincentive *when no other disincentive will deter future bad conduct.*") (emphasis added).

Evaluating the relevant factors, with a focus on whether the $196.2 million punitive award is greater than reasonably necessary to punish and deter, shows that the punitive award is grossly excessive.

The alleged conduct was not sufficiently reprehensible to justify one of the largest punitive exactions in the history of West Virginia. The Circuit Court stated that DuPont's failure to prevent all emissions constituted reckless indifference. (Binder 54, p. 24972, Order

Den. Mot. to Vacate at 27 (2/25/08).) As discussed above, however, without proof that DuPont could have or should have prevented the emissions, or even known that they posed significant health risks, that evidence does not support any punitive award, much less a nine-digit exaction. Nor does DuPont's failure to remediate beyond the boundaries of the site, given that the expert regulators told DuPont that such remediation was unnecessary. Even if DuPont may be held liable for that decision, the failure to do what expert agencies say is unnecessary is not the kind of morally repugnant conduct that can justify a high punitive award.

The ratio of punitive to compensatory damages is excessive. The $196 million punitive award is more than 3.5 times the $55.5 million harm that the jury found plaintiffs to have suffered. Yet the U.S. Supreme Court repeatedly has observed that "[w]hen compensatory damages are substantial," as they undeniably are here, a ratio of 1:1 "can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425; *see also Exxon Shipping*, 128 S. Ct. at 2634 n.28 ("the constitutional outer limit may well be 1:1" in cases involving "substantial" class recoveries). The Court has further suggested that, as a matter of common law, "in cases with no earmarks of exceptional blameworthiness within the punishable spectrum," "a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases . . . should be grouped" and that "a 1:1 ratio, which is above the median award, is a fair upper limit." *Exxon Shipping*, 128 S. Ct. at 2633 (footnote omitted). Lower courts repeatedly have recognized that a ratio of *lower* than 1:1 may be the maximum when the compensatory damages and other costs borne by the defendant already suffice to punish and deter.[24]

[24] *See, e.g., Adidas Am., Inc. v. Payless Shoesource, Inc.*, 2008 WL 4279812, at *16 (D. Or. Sept. 12, 2008) (reducing punitive damages to half of "substantial" $30 million compensatory award); *Zakre v. Norddeutsche Landesbank Gironzentrale*, 541 F. Supp. 2d 555, 567 (S.D.N.Y. 2008) (reducing punitive

That is the situation here. DuPont already has paid $20 million to remediate the site, has been ordered to pay another $55 million to remediate Plaintiffs' properties, and is subject to a medical-monitoring plan that is estimated to cost scores of millions more. These massive financial obligations are more than sufficient to punish and deter, making anything more than a nominal punitive award excessive under West Virginia law and the U.S. Constitution.

For that reason, the Circuit Court's holding that Plaintiffs' estimate of the medical-monitoring costs should be included in the denominator and that the ratio therefore is 1:1, not 3.5:1 (Binder 54, p. 24972, Order Den. Mot. to Vacate at 28 (2/25/08)), is beside the point: What matters is that the *absolute amount* of punitive damages is far greater than necessary to punish and deter given the other financial consequences of the conduct for which DuPont was held liable.

But insofar as this Court concludes that it is necessary to resolve the dispute over the denominator, the Circuit Court was wrong. The Supreme Court has held that the denominator generally is "the actual harm inflicted upon the plaintiff." *BMW*, 517 U.S. at 580. Potential harm may be included only if it is "likely to occur." *Garnes*, 186 W. Va. at 668, 413 S.E.2d at 909; *accord BMW*, 517 U.S. at 581. Here, there is no allegation that any class member has suffered any physical harm or incurred any medical cost. The projected cost for the program turns on assumptions that Plaintiffs' own expert admits are "not evidence based, nor are they based upon prior experience." (Binder 54, p. 24676, Werntz Med. Mon. Econ. Rep. at 1 (3/30/07), Ex. I to DuPont's Post-Hr'g Sub. re Med. Mon. (2/4/08).)

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award from $2.5 million to $600,000 where compensatory damages were "roughly $1.5 million"); *Watson v. E.S. Sutton, Inc.*, 2005 WL 2170659, at *19 (S.D.N.Y. Sept. 6, 2005) (suggesting that 1:1 was the constitutional maximum where compensatory damages were $1,554,000, but ordering a remittitur to less than half of the compensatory damages under Fed. R. Civ. P. 59).

And the court's cost estimate is grossly inflated. (Binder 54, p. 24676, DuPont's Post-Hr'g Sub. re Med. Mon. at 8-15 (2/4/08).)

The punitive award vastly exceeds civil penalties for comparable conduct. The actual fining practice of regulatory agencies is highly relevant to whether the defendant had fair notice of the potential penalty and also to whether the award is necessary to punish and deter. *BMW*, 517 U.S. at 574, 584.[25] Here, the punitive award is not in the same universe as the civil penalties that could have been imposed for the conduct for which DuPont was held liable.

When DuPont owned and operated the Spelter facility between 1928 and 1950, no administrative fines were, or could have been, imposed, because neither EPA nor DEP, nor the environmental statutes that those agencies enforce, even existed. Nor did punitive awards for environmental misconduct or nuisance begin to approach even a fraction of this award.[26] During the second time period when DuPont owned the site—2001 to the present—DuPont remediated the site, and the plant was not operating. DEP and EPA were well aware of and supervised all of DuPont's conduct during that period, and they imposed no penalties. To the contrary, both agencies approved of DuPont's remediation efforts, including the decision not to extend the remediation beyond the boundaries of the site. DuPont therefore lacked notice that it could be subjected to any penalty for that conduct.

In addition, the size of DEP and EPA fines imposed on other companies for far more egregious conduct shows that a punitive award of $196.2 million bears no relation to legitimate state interests. Although DEP does not make its penalties publicly available, the highest DEP

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[25] The U.S. Supreme Court and other courts have held that courts should not rely on hypothetical maximum fines that have never been imposed by the relevant agency. *See, e.g., Cooper Indus.*, 532 U.S. at 442-43; *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999).

[26] The highest punitive award ever upheld in a published opinion for *any* conduct in West Virginia as of 1950 was $1,000. *See Turk v. Norfolk & W. Ry. Co.*, 75 W. Va. 623, 631-32, 84 S.E. 569, 572-73 (1915).

fine ever discussed in a published judicial decision, imposed for illegally discharging raw sewage into a waterway, was only $100,000. *See Taylor v. Culloden Pub. Serv. Dist.*, 214 W. Va. 639, 642, 643 n.10, 591 S.E.2d 197, 200, 201 n.10 (2003). The highest fine ever imposed by EPA's Region 3, which includes West Virginia, is $12 million for a "catastrophic explosion" that killed a worker and caused "a massive discharge of spent sulfuric acid" into the Delaware River. (*See* Binder 51, p. 23428, Memo re Mot. to Vacate, Ex. A & Ex. B, Tab 18. (12/4/07).) The $184 million disparity between the punitive award and the record EPA fine is powerful evidence of excessiveness.

DuPont's profits do not justify the punitive award. The record contains three categories of evidence relating to "profits." First, Plaintiffs introduced evidence of DuPont's total firm-wide profits (Binder 50, 10/16/07 Tr. 5401-03), none of which were derived from Spelter. Profits from non-culpable conduct are irrelevant to the punitive damages inquiry. *See State Farm*, 538 U.S. at 424.

Second, Plaintiffs asserted that it would have cost DuPont $325,000 to install the pollution-control equipment necessary to comply with government standards. Even taking that figure at face value, however, the estimated cost of the medical-monitoring program alone is hundreds of times greater.

Finally, as for the Circuit Court's finding that DuPont "avoid[ed] a remediation cost . . . that was estimated at $300 million" (Binder 54, p. 24972, Order Den. Mot. to Vacate at 30-31 (2/25/08)), that is the cost allegedly avoided by capping, rather than removing, the tailings pile, a decision that Plaintiffs have not shown caused them any harm. As a consequence, no amount of punitive damages is necessary to ensure that DuPont did not profit from its alleged misconduct.

DuPont's financial position does not justify the punitive award. The Circuit Court stated that the punitive damages were "reasonable" because "a punitive damage award must necessarily be large" "to accomplish punishment and deterrence for such a wealthy company." (*Id.* at 32.) This directly contradicts *State Farm*, which held that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 538 U.S. at 427; *see also BMW*, 517 U.S. at 585 ("The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business.").

The Supreme Court's recent decision to reduce a punitive award against ExxonMobil, the wealthiest company in the world, by applying a strict ratio cap, confirms the *State Farm* holding. *Exxon Shipping*, 126 S. Ct. at 2634. The relevant question is whether a large punitive award—on top of compensatory damages and remediation costs—is necessary to deter. DuPont's wealth has no bearing on that question.

The policy of encouraging settlement does not support the punitive award. DuPont's failure to settle the claims does not warrant a large punitive award because there was no "clear wrong" here. *See Garnes*, 186 W. Va. at 668, 413 S.E.2d at 909. To the contrary, the State, through DEP, endorsed DuPont's remediation efforts. Far from encouraging settlement, this massive punitive award, against a party that complied with all regulations, magnifies "the stark unpredictability of punitive awards," *Exxon Shipping*, 128 S. Ct. at 2610, rendering future settlements less likely. Reliance on this factor also would violate DuPont's right under the U.S. Constitution to litigate potentially meritorious defenses. The First Amendment "protects vigorous advocacy." *NAACP v. Button*, 371 U.S. 415, 429 (1963); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). Similarly, the Due Process Clause guarantees the "right to

litigate the issues raised." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Applying this *Garnes* factor in connection with punitive damages is unconstitutional because it deters the exercise of those rights. *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) ("one should not be penalized for merely defending or prosecuting a lawsuit").

Other* Garnes *factors do not justify the punitive award. *Garnes* also considers Plaintiffs' litigation costs, related criminal penalties against the defendant, the deterrent effect of other lawsuits for the same conduct, and the encouragement of settlement in evaluating the size of a punitive award. 186 W. Va. at 668, 413 S.E.2d at 909. None of those factors supports the massive award here.

In sum, the gigantic punitive award in this case violates both state law and the Due Process Clause. It should be set aside entirely or, at the very least, substantially reduced.

5. Punitive damages were improperly awarded to medical-monitoring class members who proved no present personal injury

The Circuit Court erred in allowing the medical-monitoring class to recover punitive damages. In West Virginia, a jury may not return an award of punitive damages without a showing of actual harm and an award of compensatory damages. *See Garnes*, 186 W. Va. at 667, 413 S.E.2d at 902. The medical-monitoring class has not alleged, much less proven, any "actual harm" as a result of arsenic, cadmium, and lead exposure in the class area. *See Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 142, 522 S.E.2d 424, 433 (1999) (requiring medical-monitoring plaintiffs to show a significantly increased risk of disease, not actual present harm). Awarding punitive damages without a showing of actual harm also violates due process. *See State Farm*, 538 U.S. at 416-17.

In their response to DuPont's petition, Plaintiffs claim that this Court has already held that medical-monitoring damages qualify as "actual harm" sufficient to support an award of punitive damages. The case Plaintiffs rely on, *State ex rel. Chemtall, Inc. v. Madden*, 216 W. Va. 443, 455, 607 S.E.2d 772, 784 (2004), never uses the words "actual harm" and had nothing to do with punitive damages. A subsequent decision by this Court in the same case reserved the question whether punitive damages are appropriate in medical-monitoring cases. *State ex rel. Chemtall, Inc. v. Madden*, 221 W. Va. 415, 421, 655 S.E.2d 161, 167 (2007).

Plaintiffs' fallback argument—that punitive damages are appropriate because medical-monitoring costs are simply another form of compensatory damages—is also wrong. The medical-monitoring class has not been awarded compensatory damages in this case. The jury found only an entitlement to some type of monitoring. The Circuit Court then "exercise[d] its equitable powers to address, post-trial, the medical monitoring program's scope, duration, and cost." (Binder 23, p. 9755, Letter to Counsel from J. Bedell Setting Forth Trial Mgmt. Plan at 2 (6/14/07).) Even Plaintiffs' counsel has described the medical monitoring awarded to the class as an "equitable remedy." (Binder 46, 10/2/07 Tr. 3938.)

"[A] finding of compensatory damages by a jury is an indispensable predicate to a finding of . . . punitive damages [under] the current law in West Virginia." *LaPlaca v. Odeh*, 189 W. Va. 99, 101, 428 S.E.2d 322, 324 (1993). *Cf. Given v. United Fuel Gas Co.*, 84 W. Va. 301, 306, 99 S.E. 476, 478 (1919) ("No authority for jurisdiction in equity to award punitive damages has been cited or found."). Because the medical-monitoring class cannot satisfy this "indispensable predicate," the award of punitive damages must be reversed.

CONCLUSION

The Court should reverse and render judgment for DuPont on all claims. At a minimum, the Court should order a new trial because of the Circuit Court's many errors. Alternatively, the Court should drastically reduce the punitive damages and remand with instructions to re-evaluate the medical-monitoring program.

Respectfully submitted,

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Nos. 34334 & 34335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LENORA PERRINE, et al., Plaintiffs Below, Appellees,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, et al., Defendants Below,

E.I. DU PONT DE NEMOURS AND COMPANY, Appellant.

CERTIFICATE OF SERVICE

I, JAMES S. ARNOLD, counsel for Appellant E.I. du Pont de Nemours and Company, hereby certify that service of DuPont's Appellant's Brief has been made upon the parties herein via Federal Express, on this 12th day of November, 2008, as follows:

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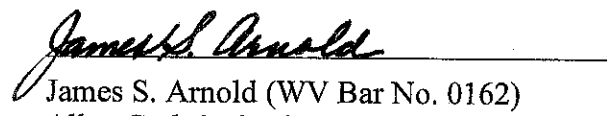

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